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PROCEEDINGS AND ORDERS

DATE: 050385

CASE NBR 84-1-00501 CFH
SHORT TITLE Mintzes, Warden
VERSUS Buchanon, Nealy

DOCKETED: Sep 28 1984

Date	Proceedings and Orders
Sep 28 1984	Petition for writ of certiorari filed.
Oct 26 1984	Brief of respondent Nealy Buchanon in opposition filed.
Oct 26 1984	Motion of respondent for leave to proceed in forma pauperis filed.
Oct 31 1984	DISTRIBUTED. November 21, 1984
Nov 26 1984	Motion of respondent for leave to proceed in forma pauperis GRANTED.
Nov 26 1984	Petition GRANTED.
	**********
Dec 10 1984	Motion of respondent for appointment of counsel filed.
Dec 10 1984	DISTRIBUTED. Jan. 5, 1985. (Above motion).
Dec 13 1984	Suggestion of mootness filed by petitioner Mintzes, Warden.
Dec 21 1984	Response of respondent to suggestion of mootness filed.
Feb 1 1985	DISTRIBUTED. Feb. 15, 1985. (Suggestion of mootness and motion of respondent for appointment of counsel).

CONTINUE {

PROCEEDINGS AND ORDERS

DATE: 050385

CASE NBR 84-1-00501 CFH
SHORT TITLE Mintzes, Warden
VERSUS Buchanon, Nealy

DOCKETED: Sep 28 1984

Date	Proceedings and Orders
Feb 19 1985	REDISTRIBUTED. Feb. 22, 1985. (Suggestion of mootness and Motion for respondent for appointment of counsel).
Mar 25 1985	REDISTRIBUTED. Mar. 29, 1985. (Suggestion of mootness and motion of respondent for appointment of counsel).
Apr 5 1985	DISTRIBUTED. Apr. 12, 1985. (Suggestion of mootness and motion of respondent for appointment of counsel).
Apr 15 1985	Petition DISMISSED. PER CURIAM OPINION. Dissenting opinion by The Chief Justice. Opinion per curiam. Justice Powell OUT.

1pp

84-501

NO. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

BARRY MINTZES,

Petitioners,

v

NEALY BUCHANON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

IS THE EQUITABLE DOCTRINE OF LACHES EMBODIED IN 28 USC FOL. § 2254, RULE 9(a), APPLICABLE TO A TWENTY-FIVE YEAR OLD PLEA BASED STATE CONVICTION OF FIRST DEGREE MURDER WHERE A STATE SHOWS PREJUDICE FROM THE DELAY.

II.

WHETHER A SINGLE WAIVER OF COUNSEL IS CONSTITUTIONALLY ACCEPTABLE FOR PURPOSES OF A UNITARY PROCEEDING TO ACCEPT GUILT PLEA AND ASCERTAIN DEGREE OF GUILT UNDER MICHIGAN'S OPEN MURDER STATUTE.

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NO. _____

In The

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NEALY BUCHANON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

On October 19, 1956, Respondent Nealy Buchanon tendered a guilty plea to two counts of open murder. (Appendix 52a). In the degree of guilt phase of his guilty plea proceeding Respondent was found guilty of first degree murder and sentenced to a mandatory term of life imprisonment. (Appendix 160a).

Respondent's post conviction activity can be summarized as follows:

In 1966 Respondent, in *propria persona,* filed a delayed motion for new trial in Ingham County Circuit Court. Respondent alleged that the Trial Court violated Michigan GCR 1963, 785.3(1)(2)(3), in neglecting to inquire of Respondent's

desire for appointed counsel, and in failing to acquire a valid waiver of counsel. The Trial Court appointed an attorney to represent Respondent in proceedings therein. On May 16, 1968, the Trial Court denied Respondent's motion for new trial.

A counseled application for leave to appeal was denied by order of the Michigan Court of Appeals on August 26, 1968. A counseled application for leave to appeal was denied by the Michigan Supreme Court November 12, 1968. *People* v *Buchanon*, 381 Mich 796 (1968). A *propria persona* application for leave to appeal was denied by the Michigan Supreme Court January 14, 1969. *People* v *Buchanon*, 381 Mich 796 (1969). Respondent's *in forma pauperis* application for writ of certiorari to the United States Supreme Court was denied on May 26, 1969. 395 US 929 (1969). Rehearing was denied by the Supreme Court on October 13, 1969. 396 US 871 (1969).

A *propria persona* motion to withdraw guilty plea and delayed motion for new trial was denied by the Trial Court on November 8, 1971. Issues raised therein are unrelated to the instant proceeding.

A *propria persona* delayed motion to withdraw guilty plea, vacate judgment, and for new trial was denied by the Trial Court May 1, 1973. Thereafter, a *propria persona* application for delayed appeal was denied by order of the Michigan Court of Appeals dated August 29, 1973.

Application for leave to file delayed motion for new trial was denied by the Trial Court on April 1, 1977. Respondent's application raised grounds not germane to the instant petition. An application for leave to appeal from the Trial Court's denial was denied by order of the Michigan Court of Appeals dated

August 23, 1977. Application for leave to appeal was denied by the Michigan Supreme Court on May 24, 1978. *People* v *Buchanon*, 402 Mich 950E (1978). All pleadings on behalf of Respondent in 1977 and 1978 were filed *in propria persona*.

Respondent's application for federal writ of habeas corpus was filed October 1, 1979. A motion to voluntarily withdraw the application was granted by the District Court on October 23, 1980.

An application for reconsideration and reinstatement of the application for habeas relief was granted by the District Court on December 8, 1980.

Following consideration of Respondent's claims and Petitioner's motion to dismiss, the District Court ordered an evidentiary hearing to ascertain the circumstances of Respondent's plea-based conviction and sentence. The District Court appointed counsel to represent Respondent at the evidentiary hearing.

After this hearing, the federal magistrate issued a report and recommendation concluding that none of Respondent's constitutionally protected rights had been violated during the arraignment or plea taking proceedings. (Appendix 35a).

The District Court rendered a memorandum opinion dated October 21, 1982 (Appendix 24a-33a) concurring with the examining magistrate that Respondent's guilty plea was freely and voluntarily offered, that a constitutionally valid waiver of counsel had occurred, and concluding that Respondent's guilty plea was not coerced. The court, however, found that Respondent had not voluntarily waived his right to counsel at the degree of guilt proceeding. The District Court found that review of this claim was not barred by Rule 9(a) of 28 USC fol. § 2254. (Appendix 31a-33a).

On May 9, 1984, a panel of the United States Court of Appeals issued an opinion affirming in part, and reversing in part, the decision of the District Court and holding that a writ of habeas corpus should issue. (Appendix 1a-23a). The opinion affirmed a District Court conclusion that in October, 1959, Respondent executed a valid plea of guilty to two counts of open murder. The affirmation recognized Respondent's valid waiver of counsel during the course of plea taking. The opinion also affirmed the finding of the District Court that Respondent had not executed a constitutionally acceptable waiver of counsel for purposes of a determination of degree of guilt. The court reversed as inappropriate a requirement that the state retry Respondent within sixty (60) days. (Appendix 17a).

Finally, a majority of the panel concluded that the equitable doctrine of laches embodied in Rule 9a of 28 USC fol. § 2254 did not bar examination of Respondent's counselless degree of guilt claim. (Appendix 17a).

Rehearing was denied by the United States Court of Appeals on July 3, 1984.

JURISDICTION

Petitioner seeks review of the Court of Appeals opinion issued as mandate July 11, 1983. This Court's jurisdiction is invoked pursuant to 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

United States Constitution Amendment VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

> the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 USC fol. 2254, Rule 9(a)

> Rule 9. Delayed or Successive Petitions
>
> (a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

MCLA 750.318; MSA 28.550.

> Degree of murder, determination; testimony, open court, transcript
>
> Sec. 318. The jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree; but, if such person shall be convicted by confession, the court shall proceed by examination of witnesses to determine the degree of the crime, and shall render judgment accordingly. All testimony taken at such examination shall be taken in open court and a typewritten transcript or copy thereof certified by the court reporter taking the same, shall be placed in the file of the case in the office of the county clerk.

STATEMENT OF THE FACTS

On September 3, 1956, Howard and Myra Herrick were murdered at their farm in rural Ingham County, Michigan.

Respondent, an escapee from the State Prison of Southern Michigan, was arrested October 16, 1956, in Baltimore, Maryland. Respondent was returned to the State of Michigan on October 16-17, 1956.

At 5:24 p.m., Thursday, October 18, 1956, Respondent offered his confession to the homicides at issue. (Appendix 70a). Prior to rendering his confession Respondent stated he understood that the statement would be used against him. (Appendix 71a). Respondent also affirmed that his statement was freely and voluntarily made without threat or promise. (Appendix 71a-72a). After making these comments, Respondent rendered a full and detailed confession to the murders. (Appendix 72a-100a).

Respondent was arraigned in justice court for the City of Mason, Michigan, October 18, 1956, at 8:00 p.m. At the justice court arraignment Respondent waived preliminary examination on charges of open murder and elected to proceed to Ingham County Circuit Court.

Respondent was arraigned in Ingham County Circuit Court October 19, 1956, at 9:30 a.m. The transcript reveals that trial judge Marvin J. Salmon advised Respondent that he was entitled to an attorney at public expense:

> THE COURT: Do you understand the charge, Mr. Buchanon?
>
> RESPONDENT: Yes, your Honor.

> THE COURT: The Court wishes to advise you that you are entitled to be represented by a lawyer, and if you are not financially able to employ one and will so advise the Court, the Court will see that you have a lawyer. Do you understand that?
>
> RESPONDENT: Yes, sir.
>
> (Appendix 52a).

The Trial Court informed Respondent he was entitled to trial by jury:

> The Court: The Court also wishes to inform you you are entitled to have a trial, either before a jury or before the Court without a jury. Do you understand that?
>
> The Respondent: Yes.
>
> (Appendix 52a).

The Trial Court inquired whether Respondent's plea was induced by promise:

> The Court: How do you wish to plead, guilty or not guilty?
>
> The Respondent: Guilty, your Honor.
>
> The Court: Has anyone made you any promise of any kind to induce you to plead guilty?
>
> The Respondent: No, sir.
>
> The Court: Has anyone stated to you if you would plead guilty he would secure leniency from the Court?

The Respondent: No, sir.

The Court: Then are you pleading guilty because you actually are guilty?

The Respondent: Yes, sir.

The Court: Very well.

(Conference in chambers)

(Appendix 53a).

Finally, after a brief in chambers conference between Judge Salmon and Respondent, the Court rendered factual findings about Respondent's guilty plea:

> The Court: Let the record show that the Court has conferred with the accused relative to the circumstances in each one of these crimes, is convinced that he committed the crimes, and that his plea was freely, understandingly, and voluntarily made, without undue influence, compulsion or duress and without promise of leniency.
>
> (Appendix 53a).

Since Respondent had pleaded guilty to open murder, the Trial Court, after a brief recess, proceeded to ascertain the degree of guilt as required by Michigan law, MCLA 750.318; MSA 28.550. Proof of this issue was offered by sheriff deputies who testified concerning the location and position of the bodies when discovered. (Appendix 57a-63a). A medical examiner testified about the cause of each victim's death. (Appendix 65a). Respondent's confession was read into the record. (Appendix 70a-100a). The Ingham County Sheriff testified about incriminatory statements rendered by Respondent during the trip from Baltimore to Lansing on October 16, 17,

1956. (Appendix 101a). A ball-peen hammer, grinding wheel, photographs, and stenographic record of Respondent's signed confession were offered and admitted in evidence. (Appendix 68a).

At the close of all proceedings (12:30 p.m.) the Court concluded that both murders were in the first degree. (Appendix 104a). Respondent was sentenced to two terms of life imprisonment. (Appendix 105a-106a).

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION RESPECTING APPLICABILITY OF THE EQUITABLE DOCTRINE OF LACHES EMBODIED IN 28 USC FOL. 2254 TO A TWENTY-FIVE YEAR OLD PLEA BASED STATE CONVICTION OF FIRST DEGREE PREMEDITATED MURDER.

The Court of Appeals struggled with application of 28 USC fol. § 2254 Rule 9a to the instant cause. Each panel member issued a separate written opinion expressing his view of Rule 9a and its application to Respondent's request for relief under the federal habeas statute.

28 USC fol. 2254, Rule 9(a), requires a showing of prejudice prior to dismissal of a delayed petition. Each federal circuit has adopted the prejudice requirement and has applied its terms.

In the case at bar, the Court of Appeals' majority applied an extremely narrow view of 28 USC fol. 2254, Rule 9(a). The majority declined to bar review due to a perception that

the existing record was adequate to resolve Respondent's claim regarding lack of counsel at the degree phase. In their view the state could not sustain a claim of prejudice in these circumstances. (Appendix 17a). The Court of Appeals then concluded that there is "nothing in the transcript of the degree hearing or the sentencing that indicates any mention of right to counsel or any knowing waiver of [Respondent's] right at those stages".

The majority decision on this issue ignores the value of relevant documentation and participant testimony ordinarily available to supplement recorded proceedings. The importance of supplemental participant testimony was amply illustrated in the case at bar when the trial judge was called upon to discuss his in chambers conferences with Petitioner. (See *infra* at p. 9). At least one federal circuit has followed this approach and barred review of a delayed petition where the state showed that documentation or participant testimony would have had "potential use" to the state's ability to respond. *Cotton* v *Mabry*, 674 F2d 701, 705 (CA 8, 1982). In such cases, loss or impairment of witness recollection and absence of relevant records seriously impairs the state's *opportunity* to demonstrate a valid waiver. Instead, the court here took a narrow view of the procedural rule at issue and relied solely on the case transcript and the very limited recall of the trial judge.

Petitioner contends the majority's narrow view is misplaced in a proceeding ostensibly guided by equitable principles. While a particulized showing of prejudice is appropriate [see *Papskar* v *Estelle*, 612 F2d 1003 (CA 5, 1980); *Autry* v *Estelle*, 719 F2d 1247 (CA 4, 1982); *Moore* v *Smith*, 694 F2d 115, 117 (CA 6, 1982)], the view expressed below imposes too high a burden.

The basis for disagreement as to applicability of 28 USC fol. § 2254 Rule 9a has its foundation in equitable considera-

tions being balanced by habeas tribunals. In *McMann* v *Richardson*, 397 US 759, 773 (1970), the Court discussed these equitable issues:

> What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and given another choice between admitting their guilty and putting the state to its proof.

At issue herein is a plea-based conviction obtained twenty-eight years ago. Respondent's conviction has been repeatedly affirmed by the Trial Court and Michigan's appellate tribunals. The span of time between conviction and habeas application has erased the memories of principal parties involved in Respondent's conviction. Only a single principal party, Judge Marvin Salmon, could recall the circumstances surrounding Respondent's plea. Judge Salmon indicated at the federal evidentiary hearing conducted September 3, 1981, that even his memory of events is limited. Indeed, much of Judge Salmon's testimony was based on his practice rather than his actual memory of events. Judge Salmon had no recollection of guilt determination.

Trial prosecutor Peter J. Treleaven has no independent recollection of events surrounding Respondent's confession, guilty plea, and/or sentence. Trial prosecutor Jack W. Warren, now a State Circuit Judge in Ingham County, Michigan, has no independent recollection of the events surrounding Respondent's confession, guilty plea, and/or sentence. Then Ingham County Prosecuting Attorney Charles E. Chamberlain, no longer resides in the State of Michigan, and could not be located at the time of Respondent's evidentiary hearing. Former Ingham County Sheriff Willard I. Barnes is deceased. Former officer in Judge Salmon's court, Burton Boone, is deceased.

None of the remaining individuals noted on available documents has independent recollection of events surrounding Respondent's confession, guilty plea, and/or sentence.

In addition to the absence of potential witnesses, the passage of time has caused loss of critical records ordinarily available to Petitioner answering a habeas claim. All of the files respecting Respondent's initial motion to withdraw guilty plea and subsequent appeal are unavailable. The prosecutor's file on Respondent's arrest, confession, guilty plea, degree hearing, and sentence is lost. The circuit court file on Respondent's guilty plea, degree hearing, and sentence is lost. Many of the briefs on appeal and trial court briefs on Respondent's motion have met a similar fate. It is important to note that these files and records are critical not only for their content, but as potential refreshment devices.

Judge Celebrezze accurately described the situation when he concluded in his dissent that "the State of Michigan has established that the twenty-three year delay has affected adversely its ability to respond to Petitioner's sixth amendment claim." (Appendix 22a-23a). The judge noted that in light of a dearth of available documentation and participant testimony "one cannot with any degree of probability determine whether the Petitioner was informed adequately of his right to counsel at the degree hearing."

Accordingly, an appropriate application of 28 USC fol. 2254, Rule 9(a), precludes habeas examination of Respondent's Sixth Amendment claim. To hold otherwise invites revisitation and possible reversal of state convictions long ago considered final. Also at risk are precious state economic resources more appropriately expended in other areas of the criminal justice system. These critical issues require examination in this forum.

II.

A SINGLE WAIVER OF COUNSEL IS CONSTITUTIONALLY ACCEPTABLE FOR PURPOSES OF A UNITARY PROCEEDING TO ACCEPT GUILTY PLEA AND ASCERTAIN DEGREE OF GUILT UNDER MICHIGAN'S OPEN MURDER STATUTE.

The Court of Appeals imposed upon the State of Michigan a procedure not appropriate under Michigan's open murder statute and not required by the Federal Constitution. The Court held that after a criminal defendant has pleaded guilty to open murder a separate hearing must be conducted to determine degree of guilt. A concomitant requirement of the court's interpretation is a duty to re-inquire of the defendant's desire for counsel at the onset of guilt determination. The opinion below is clearly contrary to Michigan caselaw and rational statutory interpretation.

The Michigan statute does not contemplate a separate hearing. After a guilty plea is rendered, the trial judge may proceed in the same hearing to determine the degree of petitioner's guilt. See *People* v *Armstrong*, 390 Mich 693, 700; 213 NW2d 190 (1973). This unitary proceeding does not require an additional inquiry regarding appointment of counsel.

Michigan appellate tribunals have uniformly held that determination of degree of guilt under Michigan law is not a trial, and does not contemplate a reimposition of fundamental federal constitutional principles. *People* v *Roberts*, 211 Mich 187; 178 NW 690 (1920) (impaneling of jury not contemplated by statute); *People* v *Pierson*, 54 Mich App 270; 180 NW2d 53 (1970); *People* v *Case*, 7 Mich App 217; 151 NW2d 375 (1967).

Respondent was fully advised of his right to counsel but waived his right and pled guilty in a proceeding that commenced 9:30 a.m. October 19, 1956. (Appendix 51a). The District Court and Court of Appeals concluded that Respondent's constitutional rights were not violated during the plea taking phase of the proceeding. (Appendix 14a, 29a-31a). Following a short break the unitary proceeding was reconvened to determine degree of guilt. At 12:30 p.m. the Court concluded that both murders were in the first degree. (Appendix 104a). Thereafter, Respondent was sentenced to two terms of life imprisonment.

Thus, the continuing nature of the proceeding at issue rendered a second inquiry respecting counsel utterly unnecessary.

While it is not disputed that determination of degree and sentencing are critical phases of a criminal prosecution at which a defendant is entitled to counsel, Petitioner submits that, on the record of this case, where the guilty plea, the degree hearing, and the sentencing were all part of a single proceeding, Respondent's valid waiver of counsel at the commencement of the proceeding continues throughout the entire proceeding and that no additional waivers of counsel are constitutionally required.

Even if additional waivers of counsel were required in 1956, the Court of Appeals nevertheless erred in failing to conclude that this record adequately demonstrates a valid waiver. Under *Johnson* v *Zerbst*, 304 US 458 (1938), the determination of whether there has been a valid waiver of the right to counsel depends upon the particular facts and circumstances of each case, including the background, experience and con-

duct of the accused. While a waiver may not be presumed from a silent record, *North Carolina* v *Butler*, 441 US 369 (1979), holds that a waiver need not be express, but may be inferred from a defendant's silence, an understanding of his rights and a course of conduct indicating waiver. In the instant case, the Respondent, who possessed extensive experience in the judicial process, had executed a valid waiver of counsel only one hour before commencement of the degree of guilt hearing. At the time of the plea, Respondent was informed that the court intended to determine the degree of guilt, but made no comment indicating a desire for counsel at any point in the proceedings. At the degree hearing, Respondent's voluntary confession was introduced as evidence and both the District Court and the Court of Appeals subsequently rejected challenges to the voluntariness of that confession. At the evidentiary hearing held in the District Court, Respondent testified that he knew of his right to an attorney but felt that an attorney would have been of no assistance. (Appendix 39a, 40a).

The totality of these circumstances demonstrates Respondent's understanding of his right to counsel a prior valid waiver of the right to counsel in an earlier phase of the same proceeding, and a course of conduct indicating an intelligent waiver of the right to counsel during the degree hearing and sentencing. On the facts of this case, a valid waiver of counsel may be inferred.

RELIEF

For the foregoing reasons, a writ of certiorari should issue so that this Honorable Court may examine issues critical to state criminal jurisprudence.

Respectfully submitted,

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APPENDIX

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RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 83-1252, 83-1253
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NEALY J. BUCHANON, *Petitioner-Appellant, Cross-Appellee,* v. BARRY MINTZES, Warden Southern Michigan State Prison, *Respondent-Appellee, Cross-Appellant.*	On Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed May 9, 1984

Before: CONTIE and WELLFORD, Circuit Judges; CELEBREZZE, Senior Circuit Judge.

WELLFORD, Circuit Judge, delivered the opinion of the Court. CONTIE, Circuit Judge, (pp. 16-20) authored a separate concurring opinion. CELEBREZZE, Senior Circuit Judge, (p. 21) also delivered a separate opinion in which he dissents.

WELLFORD, Circuit Judge. Petitioner, Buchanon, who is serving a life sentence in the Jackson, Michigan State Prison for committing the murders of a husband and wife in rural Michigan in 1955, filed a habeas corpus petition for his discharge from prison under 28 U.S.C. § 2254 in the Eastern

District of Michigan in 1979. His contentions that constitutional errors occurred in respect to his confession to the brutal killings and to his guilty plea, and to hearings in respect of his sentence to life imprisonment by the Michigan State Judge have been presented to a number of courts after his incarceration in 1956. His case is a kind of microcosm of the pro se actions taken by prisoners incarcerated for serious crimes in state prisons who present frequent challenges to the basis of their convictions and sentences, and the responses made by trial and appellate courts, state and federal, to these post-conviction efforts.

The battered bodies of an elderly farm couple in Ingham County, Michigan, were found by police concealed under hay bundles in their barn in September, 1955. The police had been alerted by the couple's son and daughter, who were concerned about their unexplained absence. They had been beaten about the face and head by a blunt object or objects. Warrants were issued for petitioner, a convicted felon, who had recently escaped from a nearby state prison. Buchanon was located and arrested in Baltimore in October, 1956. According to petitioner's affidavit submitted in this cause, he was questioned by law enforcement people at the Baltimore jail about the murders, and beaten on his body by a blackjack before being forced to sign extradition papers and make a statement admitting his guilt. His affidavit further sets out that shortly thereafter, the local Michigan Sheriff took him into custody and flew him to the Stockbridge, Michigan jail. He claims that he was also mistreated there by white law enforcement officials because of his race, felt threatened by a crowd of people about the jail, and was coerced into making a full confession at the Ingham County Jail before a court reporter and other officials. Buchanon also claims that the judge before

whom he pled guilty during *en camera* proceedings referred to him as a "nigger" and warned him that he "had better go along with the program." At the hearing before the district court, the state judge, now retired, indignantly denied Buchanon's claims in these respects, although he had no clear recollection after some twenty-five years of the details of the hearing and proceedings before him.

The habeas corpus petition was filed approximately twenty-three years (October 1979) after Buchanon admitted his guilt and was sentenced for the dual murders. Among its other assertions were:

1) "petitioner is presently unconstitutionally detained"

2) "petitioner has exhausted all available State remedies"

3) "no previous application to this court" (Eastern District of Michigan) "has been made"

The petition also recited that petitioner had filed an application for delayed appeal in 1968 in the Michigan Court of Appeals, and one in the Michigan Supreme Court that same year, both of which were denied; that he had filed a similar application unsuccessfully in the State Court of Appeals in 1973; and had filed a delayed application for remand to the state trial court, which had been denied in 1977 by the State Court of Appeals; and again in 1978 by the Michigan Supreme Court. In its brief, the Michigan Attorney General asserts that petitioner also unsuccessfully sought a writ of certiorari to the United States Supreme Court in 1969 (see 395 U.S. 929), and a rehearing before that Court, which denied the application in 396 U.S. 871 (1969). The brief also points out that petitioner moved to withdraw his guilty plea in the Ingham County Circuit Court in 1971, and that this motion was denied;

he filed a like delayed motion in 1973 which was again denied at the state trial and appellate level. Thus it appears that Buchanon filed, or was assisted in pursuing at least ten post-conviction efforts from 1968 through 1978 from the state trial court level to the United States Supreme Court prior to his filing the instant petition. Presumably, all of these courts considered, at least to some extent, and then denied the com-

plaints which have now come before this court on appeal. The essence of the complaints are that he was forced into making his confession,[1] and that he did not knowingly, voluntarily, and intelligently waive the right to assistance of counsel prior to submitting a guilty plea, in respect to a degree hearing, or at sentencing pursuant to the acceptance of the guilty plea, and that he was not present at the degree hearing.

The State asserts as defense to the claims of the petition for habeas corpus Rule 9(a) of 28 U.S.C. § 2254.[2] It also asserts that Buchanon made a knowing, intelligent and voluntary waiver of the assistance of counsel at all material stages of his court appearances, and that he was present at the degree hearing.

---

[1]

One confession statement sets out the details of the killings, many of which had been corroborated, and of the theft of personal property from the victims and the subsequent flight, all following his prison escape.

[2]

Rule 9(a) of 28 U.S.C. ¶ 2254 states:

> (a) *Delayed petitions.* A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

I. Is Petitioner Barred by his Long Delay?

The Advisory Committee Note to Rule 9(a) was prescient in 1976 when it stated:

> The assertion of stale claims is a problem which is not likely to decrease in frequency. . . . The grounds most often troublesome to the courts are . . . plea of guilty unlawfully induced, use of a coerced confession . . . When they are asserted after the passage of many years, both the attorney for the defendant and the state have difficulty in ascertaining what the facts are.

28 U.S.C. foll. § 2254, Rule 9, Advisory Committee Note p. 1137.

The Advisory Committee Note cites a Supreme Court reference to the problems faced in cases where defendants challenged their guilty pleas, based upon alleged forced confessions.

> What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, *but whether, years later,* defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof. (emphasis added).

McMann v. *Richardson*, 397 U.S. 759, 773 (1970).

In *McMann*, the Supreme Court refused to give cognizance to three claims of this nature, the oldest of which was fourteen years old, and reversed the court of appeals which had

granted the writs. It should be acknowledged, however, that *McMann* involved defendants who had counsel when they submitted guilty pleas, even through they claimed later a coerced confession was the basis thereof. In *Herman* v. *Claudy*, 350 U.S. 116 (1956), on the other hand, the court set aside an uncounselled state guilty plea even though the defendant had waited eight years to make a post-conviction challenge. The Court made reference to a case where a state prisoner successfully challenged validity of his conviction eighteen years after conviction.[3]

This court has read Rule 9(a) as invoking the equitable doctrine of laches, as has the Advisory Committee to Rule 9(a). Thus, in *Davis* v. *Adult Parole Authority*, 610 F.2d 410, 414 (6th Cir. 1979), a two prong test was developed:

> First, the state must appear to have been prejudiced in its ability to respond to petitioner's claims. Second, the petitioner must be given the opportunity to meet or rebut the apparent prejudice to the state, or to show that whatever prejudice the state has suffered would not have been avoided had the petition been filed earlier.

This court has considered three habeas corpus petitions challenging state convictions after many years of delay. Most recently, in *Ford* v. *Supt., Kentucky State Penitentiary*, 687 F.2d 870 (6th Cir. 1982), it affirmed denial of habeas corpus relief to a prisoner who filed his first state court action fourteen years after submitting a guilty plea. It was not until twenty-three years after the state court sentence had been imposed that he filed his petition for relase and relief in federal court

[3] *Palmer* v. *Ashe*, 342 U.S. 134 (1951).

on the grounds that he was denied the "presence of counsel at the time of plea and sentence." *Ford* at 871. As in the instant matter, the prisoner's petition was referred to a magistrate for a hearing, who recommended denial of the writ. The records of the state trial court reflected that an attorney had been appointed to represent Ford and was present in court on the day that he pled guilty. *Ford* at 871. Testimony at the hearing tended to cast doubt as to whether that attorney actually was present at the taking of the plea and the imposition of sentence. The magistrate based his recommendation to deny the writ on the merits, but the district court ruled adversely to Ford apparently based on Rule 9(a) delay grounds as well as on the merits. *Ford* at 872. Judge Lively, for the majority, ruled, at 874:

> Ford was accorded a meaningful hearing on his claim. He was unable to carry his burden of proving a constitutional violation. *This was a proper case for dismissal pursuant to Rule 9(a) after the petitioner had been given an opportunity to establish his claim and to show lack of prejudice and had failed in both respects.* (emphasis added)

This court, then, ruled that the writ was properly denied on both the merits, and the Rule 9(a) basis that Ford failed to show a lack of prejudice to the state.[4]

[4] Judge Jones, in dissent, however, asserted:

> "the majority opinion should not be read to rule that delay provided an adequate ground to deny the petition.
> Neither the magistrate nor the district judge, relied upon Rule 9(a) of the rules governing section 2254 proceedings. When the magistrate originally recommended disposition under that rule, District

In an earlier case, however, *Phillips* v. *Black*, 367 F.Supp. 774 (E.D. Ky. 1973) *aff'd. without opinion*, 497 F.2d 924 (6th Cir. 1974), there was a prisoner challenge to a guilty plea and sentence on the grounds that there had been no attorney present at sentencing in 1955. A writ of habeas corpus was granted because the record did not indicate the presence at sentencing of the attorney who had represented the petitioner in the prior course of proceedings. (The attorney, after a sixteen year delay, could not recall whether or not he had been present). *See also, Oliver* v. *Cowan*, 487 F.2d 895 (6th Cir. 1973) where absence of counsel at the time of sentencing was determined to be grounds for habeas corpus relief. (The sentencing by a jury occurred in 1959; habeas corpus relief was granted by the district court in and affirmed by this circuit in 1973).

The other recent case in this court dealing with a prisoner's long delay in seeking habeas corpus relief is *Arnold* v. *Marshall*,

657 F.2d 83 (6th Cir. 1981). Arnold was convicted in Ohio in 1953, never appealed, and was released prior to a 1973 indictment for being an habitual offender, on which he was convicted and sentenced to a life term in 1975. One of the four

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Judge Siler rejected that recommendation and required an evidentiary hearing. After a hearing was held before the magistrate, the recommendation was considered and entered by District Judge Bertelsman. While Judge Bertelsman discussed Rule 9(a), his order adopted the magistrate's report *in toto*. Even were Judge Bertelsman inclined to rely upon the rule, the familiar doctrine of law of the case would have counseled against such reliance.

The majority properly holds that unexcused delay may affect petitioner's credibility and increase his burden. *See Davis* v. *Adult Parole Authority*, 610 F.2d 410, 415 (6th Cir. 1979). It resolves the case on credibility grounds, not upon Rule 9(a).
687 F.2d at 874 n. 1 (citations omitted).

predicate convictions on which the habitual offender charge was based was the 1953 jury conviction. This became the subject matter of the 28 U.S.C. § 2254 action in 1980 (twenty-seven years after the unappealed conviction), based on his not being advised of his right to appeal. The magistrate in *Arnold* recommended that the writ be denied because key witnesses were missing or dead, no transcript was prepared, and trial notes could not be located. This court affirmed the dismissal, based on Rule 9(a).

> In view of the foregoing, this Court concludes that the twenty seven year delay has prejudiced respondent's ability to respond in a meaningful way to petitioner's claims.
>
> Our Rule 9(a) analysis, however, does not end here. Delay is excused if petitioner can show that his petition is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.
>
> No such showing has been made in this case.

657 F.2d at 84-85.

The decision to deny the writ was based on the conclusion that there was no dispute as to the underlying facts, and the "petitioner pled no facts which would serve to rebut the obvious prejudice to the State from the twenty-seven years of delay." *Arnold*, at 85. (*Davis* v. *Adult Parole Authority, supra*, was the only case cited in *Arnold*.)

It was stipulated that none of the prosecutors involved in this case, in 1955-56, had any independent recollection of the events surrounding Buchanon's arrest, statements or plea. The trial judge, retired for seven years, testified that the in-

chambers conference with petitioner incident to taking the plea was commonplace, the purpose being to talk to him away from the victim's family, the prosecutors and spectators "to see if anyone had abused him in any way or taken advantage in any way . . . [in order to coerce him] to plead guilty to the offense." He denied using any racial epithet or threatening Buchanon in any fashion during the private conference, but he could not recall if petitioner mentioned anything about police threats or coercion. The judge also testified that at the time it was not unusual for any defendant, black or white, even in a murder case, to appear without an attorney, and that he was not aware that any large crowd had gathered around the jail in Stockbridge while petitioner was there.

Based on these facts, and Buchanon's testimony at the hearing, the magistrate recommended on the merits of his claim that the writ be denied, holding:

> The record, and indeed, Petitioner's own testimony in this case, make it clear that Petitioner knew he had a right to an appointed attorney but that he declined to ask for one because he simply did not think one would do him any good (Tr. 30, 34, 55), and because he considered himself guilty of the murders (Tr. 40). The undersigned finds as a matter of fact that his decision to waive counsel was made understandingly and intelligently.

Joint App. 35 (footnotes omitted).

The magistrate distinguished *Moore* v. *Michigan*, 355 U.S. 155 (1957), principally relied upon by petitioner, wherein a 1938 state conviction was set aside. *Moore* involved a seventeen year old black defendant with a seventh grade education who

also pled guilty to murder of an elderly white victim without benefit of counsel and, again without counsel, was sentenced to life imprisonment. He was questioned in jail without an attorney for approximately 28 hours over two days and nights before orally confessing, and did not request an attorney, although advised that he might have one, at the taking of the guilty plea. Like Buchanon, Moore did not participate in the degree hearing. The trial judge's findings after an in-chambers meeting with Moore included the comment that Moore insisted something was wrong with his head and that he had experienced queer sensations. Also, the Sheriff conceded that he told Moore while he was in jail before the confession that there might be "trouble" and he could not guarantee that he could protect him in that event. In a five to four decision, the court reversed, ordering a new trial in an appeal from the Supreme Court of Michigan after a hearing on the twelve year delayed motion for a new trial, because petitioner had satisfied his burden of demonstrating that he had not understandingly and intelligently waived counsel at critical stages.

In the instant case, Judge DeMascio considered each claim made by Buchanon and the magistrate's recommendation denying each of these claims. He sustained the magistrate on the evidence submitted at the hearing in finding that Buchanon's guilty plea was voluntarily and understandingly made, and not improperly induced by coercion or threats. He found the magistrate's conclusion appropriate that petitioner's allegations of a mob outside the Michigan jail inducing or coercing his giving of a confession were not well founded. He found that although the transcript of the preliminary examination of the petitioner had been lost as had the prosecutor's file and all files pertaining to the first round of appeals in 1966, that transcripts of the taking of the plea and

of the sentencing were available as was the testimony of the state trial judge who accepted the plea, and determined that first degree murder was the correct charge. Sufficient facts and record were adduced for the district judge to find, as had the magistrate, that the Michigan trial judge had properly and carefully conducted the proceedings during the submission of the guilty plea, including an *in camera* hearing to ensure that petitioner was acting independently, knowingly, and not under compulsion, and that he had also voluntarily and un-

derstandingly waived his right to counsel at the time of the guilty plea, distinguishing the factual circumstances from those in *Moore* v. *Michigan, supra.*

The district judge, however, differed with the magistrate's conclusion that there was also an effectual and valid waiver of the right to counsel at the degree hearing and the sentencing that followed.

Judge DeMascio concluded that because petitioner "presented no evidence that would tend to support his claim that he was not present at the degree hearing," and admitted that he himself "cannot recall whether he was present," that his claim in that respect must fail. He stated as an additional basis for his conclusion, citing *Arnold* v. *Marshall, supra,* that under Rule 9(a) petitioner had not "met his burden of showing why he could not have raised his claim at a time when there would have been witnesses with an independent recollection of whether he was present at the degree hearing." He also sustained the magistrate's finding that coercion did not taint the guilty plea with respect to the alleged police beating in Baltimore. As to whether petitioner's confession was coerced, Judge DeMascio also ruled that this issue "comes within the purview of Rule 9(a)." He concluded alternatively, that Rule

9(a) was dispositive as to the claim challenging the voluntariness of the guilty plea.

The trial judge decided, contrary to the magistrate's recommendation, that merely because Buchanon had freely, knowingly and intelligently waived a right to counsel at the submission of his guilty plea, it did not follow that he similarly waived the right to assistance of counsel at the later critical stage, the degree hearing and sentencing, citing *Hamilton* v. *Alabama,* 368 U.S. 52, 54 (1961) (constitutional right in capital case to counsel at arraignment), *White* v. *Maryland,* 373 U.S. 59, 60 (1963) (constitutional right to counsel in capital case at preliminary hearing), and *Moore* v. *Michigan, supra.* He concluded further that "waiver of the right to counsel may not be implied from such a silent record," where

petitioner said nothing, there was no cross-examination, and he "presented no evidence in his behalf." *See, Carnley* v. *Cochran,* 369 U.S. 506, 515-16 (1962) (constitutional right to counsel unless waived in state felony case), and *Boykin* v. *Alabama,* 395 U.S. 238, 242-43 (1969) (guilty plea must be shown to be intelligent and voluntary). The district judge granted the writ on this sole issue, "or alternatively [the state may] amend petitioner's judgment of conviction to murder in the second degree." The state appeals from the granting of any relief, including the above alternative. Petitioner appeals on the basis that there was no knowing or voluntary guilty plea and no waiver of right to counsel at any stage.

We agree with the district court that the Rule 9(a) tests set out in *Davis* have been met on the issues pertaining to the allegedly coerced confession, the circumstances of the guilty plea, and with respect to the alleged absence of Buchanon from the degree hearing. The state clearly has been prejudiced

by the passage of some 25 years from the time of petitioner's guilty plea and sentencing to the time of the hearing on this habeas corpus writ. *See Arnold* v. *Marshall, supra; Ford* v. *Supt., supra.* While given an opportunity to rebut this prejudice caused by long delay under the doctrine of laches, including the loss of memory, potential witnesses and records, petitioner has not shown that this prejudice would not have been avoided if he had proceeded earlier on these essentially fact claims relating to circumstances surrounding the confession,[5] and as to whether he was physically present during the degree hearing. We further conclude that the same Rule 9(a) principles would apply to all the guilty plea claims which are closely intertwined with the alleged coerced confessions. This lengthy delay in presenting a federal claim after submission of a guilty plea clearly places a very heavy burden on a claimant to rebut the inherent prejudice involved. *See Arnold*

and *Ford.* We agree, furthermore, with the magistrate and the district judge that on the merits of the claims on these issues, coercion while in the Michigan jail, presence at a hearing, and the circumstances surrounding the guilty plea, petitioner cannot prevail. The Michigan confession was taken before a court reporter, and the petitioner indicated (1) that he was "*freely* and *voluntarily*" confessing; (2) that he understood the authorities could not force him to make any statement; (3) that it could be used against him; (4) that he was subject to no physical force; and, (5) that no promises were made to him in exchange for his statement. He then recounted the details of his escape from Jackson prison and the ensuing murders. At the guilty plea hearing, Buchanon, who had been involved in felony proceedings before, was advised that he could have a lawyer,

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[5]
Petitioner does not now deny that he killed both victims in 1955.

regardless of his financial ability, and a jury trial, if he wished. He was asked if any one made any promises to him to induce the guilty plea. He affirmed that he was pleading guilty because he was guilty. Based on his unequivocal responses, and a conference in chambers, the court concluded:

> THE COURT: Let the record show that the court has conferred with the accused relative to the circumstances in each one of these crimes, is convinced that he committed the crimes, and that his plea was freely, understandingly and voluntarily made, without undue influence, compulsion or duress and without promise of leniency. Therefore his pleas are accepted and he is remanded to the custody of the county sheriff to await the taking of testimony of witnesses to determine the degree of the crime, and for sentence.

As to the claimed coercion in Baltimore, that issue was precluded by the long and unexplained delay in asserting the claim where, as determined by the district judge, making an adequate defense was "entirely dependent upon witnesses who have no recollection of the facts." Buchanon failed to meet or rebut the prejudice which resulted from the passage of many

years in this regard. We find the district judge was also correct for the reasons stated in his disposition of the claim on the waiver of counsel at the guilty plea based on the evidence.

The last issue is whether the district judge was correct in holding that neither on the merits, after the hearing, nor on the basis of Rule 9(a) was petitioner precluded from obtaining relief on the claim that he did not understandingly and intelligently waive the assistance of counsel at the degree hearing and the sentencing which followed immediately. There

is, first of all, no question but that this hearing on the determination of the degree of guilt was a critical stage and bore directly on the punishment and/or disposition which was to be made by the state court after acceptance of the guilty plea. The right to counsel was a matter of "supreme importance" at this stage of the proceeding. *Moore* at 164. We recognize also that:

> . . . 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that 'we do not presume acquiesce in the loss of fundamental rights.'
> . . . .
>
> the constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court . . . . this protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.

Johnson v. *Zerbst*, 304 U.S. 458, 464-5 (1937), *quoted in Carnley, supra*, at 514-5. *See also Rice* v. *Olson*, 324 U.S. 786, 788-791 (1945).

> Even when a right so fundamental as that to counsel at trial is involved the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.'

North Carolina v. *Butler*, 441 U.S. 369, 374-5 (1979), (quoting *Johnson* v. *Zerbst*, 304 U.S. at 464). *See, Oliver* v. *Cowan, supra.*

Since the record is silent as to whether the trial court advised petitioner *at the degree hearing and at sentencing* that he was entitled to the assistance of counsel at this critical stage, and since we cannot presume a waiver by mere silence (absent other corroborated proof of a waiver), we affirm the trial judge in his holding that a writ of habeas corpus should issue unless within a reasonable time the state conducts another degree hearing and resentencing with the opportunity for petitioner to have counsel to assist him. There is a sufficient record of these proceedings to indicate that the state has not been prejudiced in its ability to respond to petitioner's claims in this respect of the case only. There is nothing in the transcript of the degree hearing or the sentencing that indicates any mention of right to counsel or any knowing waiver of this right at these stages.

We emphasize also that at the degree hearing, if any is held, Buchanon's confession may be utilized as well as the exh bits introduced at the prior hearing.

We reverse, however, the alternative ordered by the trial judge that the judgment of conviction be amended to that of murder in the second degree in lieu of the opportunity for a degree hearing and resentencing. We find no authority for this action of the trial judge.

CONTIE, J., concurring. I join that portion of Judge Wellford's opinion which holds that Rule 9(a) of the rules for habeas corpus proceedings does not bar consideration of the merits of Buchanon's claim that he did not waive his right to counsel at the degree and sentencing hearing and that portion which holds that Buchanon is entitled to relief on the merits of this claim. I also join that portion of Judge Wellford's opinion which holds that Buchanon's claims that his confession

was coerced and that he was not present at the degree and sentencing hearing are barred by Rule 9(a). I disagree, however, with Judge Wellford's application of Rule 9(a) to Buchanon's other claims. Accordingly, I write separately.

Judge Wellford states, in discussing the issue of Buchanon's waiver of his right to counsel at the degree and sentencing hearing, that "[t]here is a sufficient record of these proceedings to indicate that the state has not been prejudiced in its ability to respond to petitioner's claims *in this respect of the case only.*" (Emphasis added.) I do not believe that Rule 9(a) sweeps so broadly. Although I agree that Buchanon is not entitled to relief on the other grounds he presents, I reach this result by considering the merits of Buchanon's claimed lack of a knowing and voluntary waiver of his right to counsel at the time he entered his plea and lack of a knowing and voluntary entry of his guilty plea.

Buchanon argues that the state trial judge failed in his duty to examine closely Buchanon's waiver of the right to counsel at the time he pleaded and to take steps to assure that the waiver was a knowing one. Specifically, he relies upon *Von Moltke* v. *Gillies*, 332 U.S. 708, (1948), which states that a constitutionally valid waiver of the right to counsel,

> must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain

> that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and

> comprehensive examination of all the circumstances under which such a plea is tendered.

Id. at 724. Buchanon makes a similar, albeit less clearly articulated, claim that he did not act knowingly in entering his guilty plea. *See Moore* v. *Michigan*, 355 U.S. 155 (1957), *Cf. Boykin* v. *Alabama*, 395 U.S. 238 (1939).[1] Buchanon also claims that the waiver of his right to counsel was not voluntary due to a coercive atmosphere. This coercive atmosphere, Buchanon argues, also made his plea involuntary. The district court ruled against Buchanon on the merits of these four issues. Buchanon's claim that his confession was coerced and that he was not present at the degree and sentencing hearing were rejected by the district court on the basis of Rule 9(a), although the district court indicated that it would also rule against Buchanon on the merits of these two claims. Finally, the district court found that Rule 9(a) did not bar consideration of Buchanon's claim that he did not waive counsel at the degree and sentencing hearing and that Buchanon is entitled to relief on this claim.

It should be clear beyond doubt that a respondent relying on Rule 9(a) must show prejudice and that prejudice cannot be presumed from the mere passage of time. *See Moore* v. *Smith*, 694 F.2d 115, 117 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 1442 (1983). Clear though these propositions may be, a temptation exists to find prejudice in the absence of any specific indication of lost evidence or failed memories. Allowing petitions of this age to be considered on the merits may be impolitic, but Congress has clearly determined that, absent demonstrable prejudice, such petitions are to be heard. In

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[1] This circuit has repeatedly held that *Boykin* does not apply retroactively. *See e.g., Hendron* v. *Cowan*, 532 F.2d 1081, 1083 (6th Cir. 1976). This claim, accordingly, must be evaluated under pre-*Boykin* standards.

our judicial role, we must act consistently with Congress' determination.

As originally drafted, Rule 9(a) established a rebuttable presumption of prejudice if a petition was filed more than five years after the conviction. *See* H.R. Rep. No. 94-1471, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Ad. News, 2478, 2481. Although this presumption was intended only to place a burden on the petitioner of going forward with evidence to meet or rebut the presumption, *see* Advisory Committee Note, *reprinted in* 28 U.S.C.A. foll. § 2254 at 1137, 1138, Congress thought that even such a mild shifting of burdens was "unsound policy" and that the deletion of the presumption of prejudice was necessary to bring Rule 9(a) "into conformity with other provisions of law." H.R. Rep. 94-1471 at 5, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 2481. Rule 9(a), therefore, is not a strict statute of limitations, but instead incorporates the doctrine of laches into § 2254 proceedings. *See Davis* v. *Adult Parole Authority*, 610 F.2d 410, 414 (6th Cir. 1979).

It is apparent that a resolution of Buchanon's claims of a lack of knowledge in waiving counsel and pleading guilty depend only upon the discussions contained on the record and upon the in-chambers conference between Buchanon and the trial judge.[2] The transcript of the plea entry and waiver of counsel have been preserved. The trial judge was able to

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In *Roddy* v. *Black*, 516 F.2d 1380, 1384 n.5 (6th Cir.) *cert. denied*, 423 U.S. 917 (1975), we held that the knowing and voluntary nature of a guilty plea may be established by the testimony of the trial judge when off-the-record discussions occurred in the state proceedings. This rule should also apply in the context of determining whether a waiver of the right to counsel was knowing.

recall and testify as to the substance of the in-chambers discussion. Nothing more is needed to disprove Buchanon's claim of a lack of knowledge in waiving counsel and entering his plea. The state, therefore, has failed to show any prejudice to its ability to respond to these two claims. Thus, Rule 9(a) does not bar their consideration.

Buchanon's claims of coercion, i.e. that his waiver of counsel at the arraignment and the entry of his plea were involuntary, are more troublesome under Rule 9(a). The district court ruled against Buchanon on the merits of these claims, implicitly finding that Rule 9(a) did not apply to them. Although I might reach a different conclusion upon de novo consideration,[3] the matter is of little moment because the district court did not grant relief on these two grounds. The district court's finding that Buchanon acted voluntarily is not clearly erroneous.

Finally, I agree with Judge Wellford and the district court that Rule 9(a) bars consideration of Buchanon's claims that his confession was coerced and that he was not present at his degree and sentencing hearing. The state made a showing of prejudice as to both of these claims. It was stipulated that the

[3]

Although the determination of the underlying factual question of the presence or absence of prejudice is subject to the clearly erroneous standard, the ultimate question of whether a delayed petition is to be dismissed is subject to review only for abuse of discretion. *See Berry* v. *Mintzes*, No. 82-1150, slip op. at 6-7 (6th Cir. February 2, 1984). *See also* Advisory Committee Note, *reprinted in* 28 U.S.C.A. foll. § 2254 at 1137:

> Also, the language of the subdivision, "a petition *may* be dismissed," is permissive rather than mandatory. This clearly allows the court which is considering the petition to use discretion in assessing the equities of the particular situation.

prosecutors involved in the case had no independent recollection of Buchanon's statement and the trial judge testified that he could not remember whether or not Buchanon was present at the degree hearing. Buchanon has not rebutted this showing of prejudice.

To summarize, the state made no showing that it was prejudiced in its ability to respond to Buchanon's claims that his waiver of counsel at the time of his plea and the entry of his plea were unknowing. The district court correctly reached the merits of these claims and correctly denied relief on the merits. The district court acted within the scope of its discretion in reaching the merits of Buchanon's claims of coercion in

his waiver of counsel at the time he pleaded and in the entry of his guilty plea and its ruling on the merits of these two claims is not clearly erroneous. I join Judge Wellford's opinion only insofar as it finds that Rule 9(a) bars relief for the claim of a coerced confession and the claim that Buchanon was not present at the degree and sentencing hearing and finds for Buchanon on the merits of his claim that he did not waive counsel at the degree and sentencing hearing.

CELEBREZZE, Dissenting.

I would hold that Rule 9(a), 28 U.S.C. Sec. 2254, bars all claims presented in this long delayed petition. The State of Michigan has established that the 23 year delay has affected adversely its ability to respond to petitioner's Sixth Amendment claim. Indeed, the majority concedes that the prosecutors have no recollection of the events concerning petitioner's trial, that the trial judge has no clear recollection of the pro-

ceedings, and that the transcript of the preliminary examination, the prosecutor's files and files concerning petitioner's state court appeals have been lost. Further, the record indicates that neither the trial judge nor the petitioner could remember whether the petitioner was even present at the degree hearing. In light of these facts, one cannot with any degree of probability determine whether the petitioner was informed adequately of his right to counsel for the degree hearing. Although courts cannot presume a waiver of counsel from a silent record, the silence in this instance is due primarily to petitioner's inexcusable delay; the record contains no legitimate explanation for the more than twenty-three year delay which has affected clearly the memories of the only potential witnesses in this case. Accordingly, I respectfully dissent from the portion of this court's decision granting, in part, petitioner's writ of habeas corpus.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NEALY J. BUCHANON, Petitioner, v. BARRY MINTZES, Warden, Southern Michigan State Prison, Respondent.	Civil No. 79 73820

MEMORANDUM OPINION

The petitioner filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that his plea to an "open" charge of murder was not intelligently and voluntarily made since he was not represented by counsel; that his plea was coerced by law enforcement officials; that he was denied the right to counsel at the hearing held to determine the degree of murder; and that he was not present at the degree hearing. We referred this case to a magistrate to hear petitioner's claims and to consider whether the petitioner's claims are barred by the application of Rule 9(a) of the Rules Governing Section 2254 Proceedings, 28 U.S.C. foll. § 2254. The magistrate reported that the petitioner knowingly and intelligently waived his right to counsel; that he knowingly and intelligently entered a plea of guilty; that the petitioner knowingly and intelligently waived his right to counsel at the degree hearing; and that the petitioner was present at the hearing at which his degree of guilt was determined. The

magistrate recommended that the petition be dismissed. We agree with the report and recommendation of the magisrate except his finding that the petitioner knowingly and voluntarily waived his right to counsel at the degree hearing. With respect to petitioner's claim that he was denied the assistance of counsel at the degree hearing, we conclude that we must grant his application in part. With respect to the petitioner's other alleged grounds for relief, we adopt the report and recommendation of the magistrate as the conclusions and the findings of the court with these additional comments.

In his report and recommendation, the magistrate did not consider fully whether this suit is barred by the application of Rule 9(a) of the Rules Governing Section 2254 Proceedings. We must consider the application of Rule 9(a) since resolution of this issue may avoid an unnecessary adjudication of constitutional issues. *See generally Rosenberg v. Fleuti*, 374 U.S. 449, 451 (1963) *Hurd v. Hodge*, 334 U.S. 24, 30n. (1948) (adjudication of constitutional issues should be avoided where there are other grounds dispositive of the issues in the case). In *Davis v. Adult Parole Authority*, 610 F.2d 410 (6th Cir. 1979), the court held that before the district court could properly dismiss a petition pursuant to Rule 9(a), it must appear that the state has been prejudiced in its ability to respond to the petitioner's claims; and that the petitioner has been given an opportunity "to meet or rebut the prejudice to the state, or to show that whatever prejudice the state has suffered would not have been avoided had the petition been filed earlier." *Id.* at 414. The court also noted that prejudice to the state is presumed where the petition has been filed more than five years after his judgment of conviction. *Id.* at 414n. 12. We must determine then whether the petitioner has rebutted the inference of prejudice or has shown that he could not have by the exercise of reasonable diligence known of the grounds for relief. *See id.* at 415n. 12, 416.

The state contends that it has been prejudiced in its ability to respond by the fact that several potential state witnesses could not recall the events surrounding the petitioner's plea and by the fact that the prosecutor's file has been lost. Both these allegations are supported by the record. *See* evidentiary hearing, Tr. at 64-6, 67. Additionally, it appears that the transcript of the preliminary examination has been lost, Tr. at 67, and that all the files regarding the first round of appeals by the petitioner, which he initiated in 1966, have been lost. Tr. at 69. On the other hand, we do have the transcripts of both the plea and the sentencing and the testimony of the trial judge. On the basis of this evidence, we are able to make findings with respect to petitioner's claim that his plea was not knowing and voluntary. We are, however, somewhat hampered by the lack of information concerning whether the petitioner was present at the degree hearing.

At the evidentiary hearing neither the trial judge nor the petitioner could recall whether the petitioner was present at the degree hearing. Evidentiary hearing Tr. at 41, 92-3. The trial judge did, however, express the opinion that the petitioner was present at the degree hearing. Evidentiary hearing Tr. at 92. Additionally, a review of the transcript of the degree hearing reveals that the petitioner was called before the bench at the conclusion of the hearing in order for the trial judge to sentence him. Degree hearing at 50. The state is clearly prejudiced in its ability to respond in this case by the fact that it can present no witnesses who have an independent recollection as to whether the petitioner was present at the degree hearing. Moreover, the petitioner has done nothing to rebut this presumption of prejudice by proffering any witnesses who might support his claim. Indeed, his own testimony does not support his contention.

It is clear, however, that before we may dismiss this claim, we must determine whether the petitioner has shown that

this claim is "based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred." Rule 9(a), 28 U.S.C. foll. § 2254. *See also Davis v. Adult Parole Authority*, 610 F.2d at 416. The petitioner claims that he should be allowed to assert his claim despite the delay because he was uncounseled and did not become aware of his federal rights until 1977 or 1978. Evidentiary hearing Tr. at 10. This does not explain why the petitioner waited for some twenty-five years to assert his claims. The record reveals that the petitioner knew enough about his rights to attempt an appeal through the Michigan courts on the issue of the voluntariness of his guilty plea. Certainly, the cases upon which the petitioner relied were handed down long before the filing of this petition.[1]

Furthermore, this case is similar in its facts to *Arnold* v. *Marshall*, 657 F.2d 83 (6th Cir. 1981), wherein the petitioner waited until 1975 to challenge on constitutional grounds a 1953 conviction. The petitioner in *Arnold*, like the petitioner here, never took a direct appeal of his conviction until a number of years after the conviction and claimed that the reason for the delay was that he knew nothing of the law and was not advised of his rights. The court held that the claim was barred by the application of Rule 9(a), finding that the petitioner's ignorance of the law was not sufficient to explain why the petitioner waited twenty years to challenge his conviction. Similarly, in this case we do not feel that the petitioner has met his burden of showing why he could not have

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[1]

Specifically, the petitioner relies on *Illinois* v. *Allen*, 397 U.S. 337 (1970); *Specht* v. *Patterson*, 386 U.S. 605 (1967); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Moore* v. *Michigan*, 355 U.S. 155 (1975); and *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934), to support his claim that he was entitled to be present at the time that the degree hearing took place.

raised this claim at a time when there would have been witnesses with an independent recollection of whether he was present at the degree hearing.

Moreover, several courts have held that Rule 9(a) increases the petitioner's burden of proof to show a constitutional violation. *See Bradley* v. *Cowan,* 500 F.2d 380, 381 (6th Cir. 1974); *Hawkins* v. *Bennett,* 423 F.2d 948, 951 (8th Cir. 1970); *Phillips* v. *Black,* 367 F. Supp. 774, 776 (E.D. Ky. 1973), *aff'd* 497 F.2d 924 (6th Cir. 1974). *See also Davis v. Adult Parole Authority,* 610 F.2d at 415. Here, the petitioner has presented no evidence that would tend to support his claim that he was not present at the degree hearing. He admits that he cannot recall whether he was present. On the basis of the record and the above-cited cases, we must conclude that the petitioner was present.

The petitioner challenges the voluntary nature of his plea by alleging that he had been beaten by the police in Baltimore, Maryland just after his arrest; that there was a mob outside the jail where he was housed prior to his plea; that there were extra guards posted to protect him; and that the confession upon which the plea was based was coerced by the sheriff. Concerning the voluntary aspect of his plea of guilty, petitioner must demonstrate that his plea was the result of "[i]gnorance, incomprehension, coercion, terror, inducements, subtle or blatant threats." *Boykin v. Alabama,* 395 U.S. 238, 242-3 (1969). The magistrate found that the petitioner's claim of coercion was not supportable and we find this conclusion well supported by the record. The petitioner is the only one who had any recollection of a mob being outside the jailhouse. The newspaper accounts of his plea as well as the testimony of the trial judge indicate that there was no such mob outside. *See* evidentiary hearing Tr. at 84; petitioner's exhibit 2. Additionally, the magistrate found that the petitioner's allegation

that he was threatened by the trial judge was unsupported and we agree with this conclusion.

The magistrate also found that petitioner's plea was knowingly entered. The transcript of the petitioner's plea indicates that the trial judge was very careful to insure that the petitioner understood the nature of the charges against him, understood his right to counsel, and understood his right to a jury trial. The trial judge also took pains to establish whether the plea had been in any way coerced and to determine whether the petitioner had actually committed the crime, even going so far as to take the petitioner into his chambers away from the police, the reporters and the family of the victims to talk to him. *See* arraignment Tr. at 2-3. The record is also supplemented by the testimony of the trial judge concerning what occurred at the conference in chambers. *See* evidentiary hearing Tr. at 73, 95. We agree with the magistrate that petitioner's plea was knowing and that he should not be allowed to challenge his plea some twenty-five years later only because in retrospect the plea does not appear to be the wisest of choices. *See United States v. Brady,* 397 U.S. 742, 749-756, 757 (1970); *Boykin v. Alabama,* 395 U.S. at 242-4.

The petitioner also claims that his guilty plea was a product of a coerced confession. Whether a coerced confession can be a basis for relief from a conviction obtained due to a plea of guilty is a matter of some debate. *Compare McMann v. Richardson,* 397 U.S. 759, 770 (1970) and *Parker v. North Carolina,* 397 U.S. 790, 796-7 (1970) (both holding that where counsel advised a guilty plea, petitioner could not be heard to complain of coerced confession) with *Herman v. Claudy,* 350 U.S. 116, 118 (1956) (petitioner would be entitled to relief if he could show that guilty plea was based on coerced confession). In any event, the magistrate found that the confession was not coerced. The record clearly indicates that the confession obtained by the Michigan authorities was

entirely voluntary and that the petitioner gave it out of a desire to soothe his conscience. Furthermore, whether the confession was coerced is an issue entirely dependent upon witnesses who have no recollections of the facts and, therefore, is an issue that comes within the purview of Rule 9(a).

Finally, the petitioner contends that he did not knowingly and voluntarily waive his right to counsel. The magistrate, however, concluded that the petitioner knew of his right to counsel but declined to request counsel because petitioner believed that counsel would be of no assistance. *See* evidentiary hearing Tr. at 30, 34, 55. The petitioner contends that notwithstanding his motive, the Supreme Court's decision in *Moore v. Michigan*, 355 U.S. 155 (1957) requires that we grant his petition. In *Moore*, a case similar to this one, the Court held that the defendant had a right to counsel during the entry of his plea. *Id.* at 160. The court went on to state that the petitioner had the burden of showing by the preponderance of the evidence that he had not waived his right to counsel. *Id.* at 161. Unlike the petitioner here, the defendant in *Moore* was threatened by the sheriff into pleading guilty and waiving his right to counsel. *Id.* at 162-3. In *Moore*, the sheriff supported the petitioner's version of the facts. Here, however, there is no evidence to support petitioner's contention that he was threatened prior to entering his plea or waiving counsel. In this case, the petitioner was advised of his right to counsel, arraignment Tr. at 2, and admits that he knew of his right to counsel but declined counsel because he felt that counsel could not be of assistance. Evidentiary hearing Tr. at 301. Additionally, unlike *Moore*, the petitioner was not a young man at the time his plea was entered but rather was an escaped convict who had prior experience with the judicial system. We, therefore, agree with the magistrate's conclusion that the petitioner knowingly and voluntarily waived his right to counsel.

The petitioner contends that, in any event, he did not waive his right to counsel at the degree hearing. The magistrate found that the petitioner's waiver of his right to counsel at the time of his guilty plea was sufficient to waive counsel at the degree hearing, presumably because petitioner believed counsel would serve no useful purpose. The petitioner relies on *Conner v. Anderson*, No. 80-1262 (6th Cir. Nov. 30, 1981). The petitioner is correct that *Conner* holds that he did have a right to counsel at the degree hearing and should have been so advised. *Conner* is an unpublished opinion and its use as precedent is disfavored, except where it is believed that the opinion may have precedential value in relation to a material issue and no other published opinion would serve as well. Rule 24(b), Rules of the Sixth Circuit Court of Appeals (February 1, 1982). We have been unable to find any other case addressing directly the issue raised by the petitioner.

However, several decisions of the Supreme Court seem to indicate that the petitioner had a right to counsel at the degree hearing. In *Moore v. Michigan*, the Court in discussing the defendant's right to counsel stated:

> Moreover, the proceedings to determine the degree of murder, the outcome of which determined the extent of punishment, introduced their own complexities. With the aid of counsel, the petitioner, who, as we have said neither testified himself in the proceeding nor cross-examined the prosecution's witnesses, might have done much to establish a lesser degree of the substantive crime, or to establish facts and make arguments which would have mitigated the sentence. The right to counsel is not a right confined to representation during the trial on the merits.

335 U.S. at 160 (citations omitted). Moreover, more recent Supreme Court decisions have held that a defendant has a right to counsel at each "critical stage in a criminal proceed-

ing," that being a stage of the proceedings where rights must be "preserved or lost." *White v. Maryland*, 373 U.S. 59, 60 (1963); *accord Hamilton v. Alabama*, 368 U.S. 52, 54-4 (1961). Viewing the Supreme Court's statement in *Moore* in light of the discussions in *White* and *Hamilton*, we conclude that the petitioner did have a right to counsel at the degree hearing, unless he knowingly and voluntarily waived his right.

In his report, the magistrate found that by waiving his right to counsel at the time of his plea, the petitioner waived his right to counsel at the degree hearing. We find, however, that this is not a permissable conclusion to draw. The degree hearing involved a substantially different inquiry than did the guilty plea. It certainly could be expected that a criminal defendant who waives his right to counsel at the time of the guilty plea would nonetheless desire counsel at the time of his degree hearing. A defendant could very well believe that a lawyer would be of no assistance during the plea, but could assist in avoiding the harsher punishment accorded an individual convicted of first degree murder. During the degree hearing, the petitioner said nothing and presented no evidence in his behalf. A waiver of the right to counsel may not be implied from such a silent record. *Carnley v. Cochran*, 369 U.S. 506, 515-6 (1962). *See also Boykin v. Alabama*, 395 U.S. at 242-3. Additionally, we may not infer a waiver from the petitioner's conduct at the hearing unless it appears that the petitioner knew his rights and then acted in a manner inconsistent with the exercise of those rights. *See North Carolina v. Butler*, 441 U.S. 369, 373-5 and n.4 (1979). On the basis of the above-cited cases, we find the reasoning in *Conner* persuasive and applicable here.

Accordingly, the writ will issue unless, within a reasonable time, the state conducts a hearing, with counsel afforded to the petitioner to determine the degree of the murder or alter-

natively amend petitioner's judgment of conviction to murder in the second degree.

Robert E. DeMascio /s/

Robert E. DeMascio
United States District Judge

Dated: October 21, 1982

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NEALY J. BUCHANON, Petitioner, v. BARRY MINTZES, Warden, Southern Michigan State Prison, Respondent.	Civil No. 79 73820

JUDGMENT

This application for a writ of habeas corpus came before the court, and the court having entered its Memorandum Opinion;

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED

that the petitioner's conviction for murder shall stand but without determination of the degree of such murder;

IT IS FURTHER ORDERED AND ADJUDGED

that the writ will be granted unless the State of Michigan shall, within a reasonable period of time, conduct a hearing with counsel for petitioner present to determine whether the murder was first degree or alternatively amend petitioner's judgment of conviction to reflect murder in the second degree.

Dated at Detroit, Michigan, this 21st day of October 1982.

Robert E. DeMascio /s/

Robert E. DeMascio
United States District Judge

OCT 14 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HONORABLE ROBERT E. DEMASCIO
UNITED STATES DISTRICT JUDGE

NEALY J. BUCHANON, Petitioner, -vs- BARRY MINTZES, Warden, State Prison of Southern Michigan, Respondent.	CIVIL ACTION NO. 79-73820

MAGISTRATE'S REPORT AND RECOMMENDATION

RECOMMENDATION: Petitioner's Petition for Writ of Habeas Corpus should be dismissed as the evidence has demonstrated that he voluntarily and intelligently waived his right to counsel and pled guilty to an open murder charge in 1956.

• • •

Petitioner, a prisoner at the State Prison of Southern Michigan, filed the instant Petition For Writ of Habeas Corpus, in pro per, on October 1, 1979 challenging his two counselless pleas to murder in Ingham County Circuit Court in 1956, and the subsequent life imprisonment sentences, as being not voluntarily or intelligently tendered. Following responses from the Respondent, counsel was eventually appointed to represent Petitioner and, on July 2, 1981, Judge DeMascio ordered an evidentiary hearing held to inquire into the circumstances surrounding the guilty plea. That hearing was held on September 3, 1981 with Petitioner, his counsel, and counsel for the

Respondent present. In addition to the transcribed testimony taken at the hearing, and the exhibits introduced thereat, the Court has before it the transcripts of Petitioner's plea, his sentencing, and the hearing to determine degree of guilt (into which was read verbatim his signed statement to the police). Exhaustion of state court remedies is not contested.

At the evidentiary hearing, Petitioner testified that he was arrested in 1956 in Baltimore, Maryland for the murders of an elderly farm couple in Ingham County, Michigan (TR 13-14). He said he was first interviewed by three Baltimore police officers, who were "kind of aggressive and a little disrespectful" (TR 14), "shoved me around a little bit" (TR 15), and "beat on me with a black jack across the back and shoulders" (TR 15). He did acknowledge that you could "barely see" the bruises, that there were no scars, and that he received no medical attention for the assault (TR 47). Petitioner stated that the Baltimore police wanted him to make a statement (TR 14) and told him that it would be "easier" for him if he did, and that he would get beat up and possibly killed (TR 15) and he and his family would be in trouble (TR 16) if he did not.

An FBI agent was then called (TR 17) and Petitioner was taken upstairs where he made a statement concerning the two murders (TR 18). He said that he was scared because Baltimore was a southern town, he and his family[1] were black, and the victims were white; he thought that he could get the electric chair in Michigan (TR 16) and gave the statement because he was afraid he might be killed (TR 18) and because he thought it would be "easier for me and . . . my family" (TR 16). He admitted that the FBI agent did not beat him up and that he did not tell anyone subsequently about

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Although his family lived in the Detroit area at the time (TR 61).

the assault (TR 48). Petitioner said that he felt a "little mentally unstable, run down, tense . . . useless and alone" (TR 16), and that his "future was finished" (TR 18). He waived extradition because he wanted to get out of Baltimore (TR 19) and was taken back to Michigan by (Ingham County) Sheriff Barnes[2] (TR 18, 19). At no time in Baltimore did Petitioner have an opportunity to see an attorney (TR 16). Apparently Petitioner was flown to Detroit and then taken by car to the Ingham County jail in Mason, Michigan. He said that there were two policemen, a news reporter, and the driver in the car, and that there was some further questioning in the car about his statement made in Baltimore. (TR 24-25).

When he arrived at the Ingham County Jail in Mason, Petitioner said that there was much excitement and a lot of reporters and people, some of whom would look through the small window in his cell (TR 20). Sheriff Barnes came in and asked Petitioner if he wanted to make a statement (TR 21) and said that unless he stuck to his original statement he would turn him over to the mob outside (TR 22). At about 5:30 p.m., October 18, 1956, Petitioner was taken to the Sheriff's office in the jail and gave his statement in the presence of a court reporter, the Sheriff, one of his deputies, and two assistant prosecuting attorneys. He repeatedly acknowledged that he was doing so voluntarily and that no one had made any promises to him or had used any physical force against him (Degree Hearing TR, 15-17, 42). In his statement he described in detail how, in September 1955, he beat to death the elderly Stockbridge couple in their barn shortly after having escaped from the State Prison of Southern Michigan in nearby Jackson.

[2]
Petitioner also indicated that Sheriff Barnes told him he would take him back regardless, "dead or alive" (TR 18, 49).

At the evidentiary hearing, Petitioner acknowledged that the transcribed statement he gave was the truth and that the Michigan officials did not threaten to beat him up (TR 50, 60), but stated that at the time he was "really scared . . . and feeling very sorry for myself" (TR 26). He said he was aware a black man had been killed by a mob in 1951 or 1952 in Carolina or Mississippi for looking a a white woman (TR 23), and still thought Michigan had the death penalty (TR 52). He stated that he felt by giving the statement he would obtain "some relief from the fear" he had for himself and his family (TR 27). He did acknowledge that Sheriff Barnes asked if he wanted to see his wife (TR 26), perhaps because "he wanted to show some concern" (TR 51), and that it was "possible" that he was scared because he had murdered two people and had been caught, especially considering that they were white and he was black (TR 52).

The statement was concluded at 6:00 p.m., Petitioner returned to his cell, and later that evening he was taken before a "magistrate", where there was some discussion of bond (TR 28), and apparently a waiver of preliminary examination.

Petitioner was transported to Ingham County Circuit Court in Lansing the next morning and brought before Judge Marvin J. Salmon. There the information was read to him, he acknowledged he understood the charge, and the Court advised him of his right to counsel, that one would be appointed if he could not afford one, and of his right to a trial with or without a jury. Petitioner denied that anyone had made any promises to get him to plead guilty, or had made any representations that he would secure leniency thereby, and stated that he was pleading guilty because he actually was guilty (see Arraignment Transcript). The Judge then took Petitioner into his chambers, after which he stated on the record:

> "Let the record show that the court has conferred with the accused relative to the circumstances in each one of these crimes, is convinced that he committed the crimes, and that his plea was freely, understandingly and voluntarily made, without undue influence, compulsion or duress and without promise of leniency. Therefore his pleas are accepted and he is remanded to the custody of the county sheriff to await the taking of testimony of witnesses to determine the degree of the crime, and for sentence." (Arr. TR, p. 3)

The prosecutor was shortly ready for the degree of guilt hearing, and it commenced at 11:10 that morning. The investigating officer testified as to the scene of the crime and the evidence taken, a pathologist tesified as to the cause of death, and Petitioner's statement, made the day before, was read into the record. At the conclusion of the hearing, the Court found the two killings to have been first degree murder and immediately (12:30 p.m.) sentenced Petitioner to two life imprisonment terms, recommending that the sentences should never be decreased and that he spend the rest of his life in prison. (Degree Hearing, TR, pp. 49-52).

At the evidentiary hearing, Petitioner acknowledged the accuracy of the statements made at the arraignment (TR 57-58), but he said when he made them he was "really despondent" (TR 61), "extremely frightened" and under mental stress (TR 36), felt like a second class citizen without any rights (TR 30-31), and made the responses because he believed it would be "easier" on him and his family (TR 36), adding that he had been called racially disparaging names both in Baltimore and Michigan (TR 31-32). As to his right to counsel, Petitioner indicated he knew he could have one appointed but stated that he didn't think a lawyer would have done him any good, because all lawyers and policemen "worked together against me" (TR 30, 34, 55).

Petitioner stated that he was in chambers with Judge Salmon, alone, for about 20 minutes and generally talked "about the statement I had made and my family and my present condition at that time" (TR 62). He further stated that the Judge:

> ". . . told me that I'd better go along with the statement or else I was in trouble and my family was in trouble . . . He said, 'We got you, nigger, and we're going to hang you. A nigger did this and we're going to hang you.'"
>
> (TR 33)

Petitioner denied that he requested a lawyer before Judge Salmon in chambers (TR 33-34) and said that the Judge did not there inquire into any possible threats or coercion (TR 36-37, 59). He also stated that he did not tell the Judge he did not commit the crime (TR 62).

In addition to admitting that his statement regarding the killings was the truth (TR 50, 60), Petitioner at the hearing, when asked by his counsel why he pled guilty without a lawyer, responded: "I felt that I was guilty . . . of murder" (TR 40), although he stated he was not aware of the degrees of murder or of possible defenses (TR 27, 38, 40). As to the degree of guilt hearing, Petitioner stated that he could not recall or remember being present when the testimony was taken thereat (TR 41, 59).

Petitioner's evidentiary hearing testimony concluded with the following colloquy:

> "THE COURT: You indicated that you had some fear for yourself and some fear for your family if you didn't enter your plea. What specifically did you think that

> Circuit Judge Salmon could do if you just said, "I'm not going to plead to anything, I want a lawyer"? What did you really think they could do to you?
>
> A. I didn't think they'd—I didn't think they'd consider that. I thought they would—if I didn't—At that time I thought if I didn't go along with the statements I had made, and I'm not denying the statements, but if I wouldn't go along with the statements that I made, I could either be hung, killed, or you know, et cetera, and the family would be harmed.
>
> THE COURT: (Interposing) Who would kill you or hang you?
>
> A. The system, the people in it, you know, all of them White people in other words, is what I thought, you know, under that system.
>
> THE COURT: Well, I guess what I'm trying to discern is whether, were you afraid that they were going to turn you over to the mob and say forget about it, or did you think that if you didn't that somehow the courts would end up hanging you, or the police, or something like that?
>
> A. No, what I was thinking about, that mob—I didn't think the court would do it but I thought they would somehow make it convenient for the mob to get me."
>
> (TR 62-63)

As part of his case at the hearing, Petitioner's counsel also had admitted a signed affidavit submitted earlier by Petitioner with his pleadings (Exhibit 1), acknowledged by Petitioner to be truthful (TR 34-35), and four contemporary newspaper accounts (Exhibits 2-5) of the arrest and plea (TR 99). Counsel for both parties also stipulated that the three assistant prosecutors involved in the case were alive

but that, if called to testify, none would have any independent recollection of the events surrounding Petitioner's arrest, statements or plea (TR 64-66).

Judge Salmon was then called by Respondent and stated that he was presently retired and had been an Ingham County Circuit Judge from 1947-1974 (TR 71). He testified that the in-chambers conference with a defendant back in 1956 was a common procedure incident to the taking of a guilty plea (TR 72). The purpose of that private conference was to talk to the defendant away from the police, the victim, the victim's relatives, and spectators, "to see if anyone head abused him in any way or taken advantage in any way" (TR 73), "to determine whether or not anyone had pushed the defendant in any respect to obtain him to come in and plead guilty to the offense" (TR 74), "in good faith trying to find out if anybody had abused him in any way" (TR 89). He stated that in 1956 it was not unusual for any defendant, black or white, to appear before the court without a lawyer (TR 85), even to plead to murder (TR 89).

The Judge recalled having Petitioner in chambers and unequivocally and indignantly denied ever calling him (or anyone else) a "nigger" (TR 75, 86-87), indicating that, at least in his court, everybody, black and white, was treated alike (TR 85). He also unequivocally denied ever making any threats to Petitioner (TR 75), advising him that he should plead guilty (TR 95), or, although he was an elected judge (TR 83), feeling any community pressure to get him to plead guilty (TR 95). He did not recall Petitioner telling him in chambers about any police threats or coercion (TR 76), or even particularly discussing the statements made in Baltimore and Michigan (TR 90, 95), and he did not inquire into Petitioner's educational background (TR 91).

When shown Petitioner's four (Detroit) newspaper articles

(Exhibits 2-5) he indicated he did not remember reading any particular news accounts of the, case, although he usually read the Lansing papers (TR 79-80). He did not remember being aware if any extra guards had been posted at the jail (TR 80-82), of any large crowds outside the jail the night before (TR 84), or of the "mood" of the people around Stockbridge (TR 84). He did indicate that he would have inquired further if he thought Petitioner was being accused of something else or if someone were trying to kill him (TR 84). The Judge also stated that he had no independent recollection of presiding over the degree hearing, or whether Petitioner would have been present, although he thought he was present (TR 92-93). While he might not have affirmatively advised a defendant of his right to participate in the hearing, he certainly would have permitted it if they had wanted to (TR 93-94).

Petitioner presents three challenges to the validity of his plea-based conviction and sentence. First, he contends that he did not knowingly, intelligently and voluntarily waive the assistance of counsel to which he was entitiled, relying upon *Moore* v. *Michigan*, 355 US 155 (1957) and *Gideon* v. *Wainwright*, 372 US 335 (1963).[3] The applicable rule was stated in *Moore* to be that:

> ". . . 'where a person convicted in a state court has not intelligently and understandingly waived the benefit of counsel and where the circumstances show that his rights could not have been fairly protected, the Due Process Clause invalidates his conviction . . .'" [citing from *Pennsylvania* v. *Claudy*, 350 US 116, 118 (1956)]
> (355 US at p. 161)

and that petitioner has:

"the burden of showing, by a preponderance of the evi-

[3] See also *White* v. *Maryland*, 373 US 59 (1963); *Arsenault* v. *Massachusettes*, 393 US 5 (1968).

dence, that he did not intelligently and understandingly waive his right to counsel."
(355 US at pp. 161-162)

The record, and indeed, Petitioner's own testimony in this case, make it clear that Petitioner knew he had a right to an appointed attorney but that he declined to ask for one because he simply did not think one would do him any good (TR 30, 34, 55), and because he considered himself guilty of the murders (TR 40)[4]. The undersigned finds as a matter of fact that his decision to waive counsel was made understandingly and intelligently.[5]

Because of the similarities between *Moore* v. *Michigan, supra,* and the instant case, and Petitioner's heavy reliance thereon, it is also important to examine the cited case more closely. *Moore* reversed the 1938 conviction of a 17 year old black defendant, with a seventh grade education, who had plead guilty to the murder of an elderly white lady, without counsel, and who had an in-chambers conference with the judge and a degree of guilt hearing in which he did not participate. There are some critical differences, however. Moore was only 17 years old while Petitioner Buchanon, at the time of the proceedings, was about 32 years old[6], and had already served

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See also Petitioner's Affidavit (Exhibit 1), p.2, where he stated that he told Judge Salmon in chambers he wanted a lawyer but was advised that he wouldn't need one on these allegations, however, were directly in conflict with his evidentiary hearing testimony where he denied asking the Judge for a lawyer (TR 33-34).

[5]

Intelligently in the sense that he was aware of the options available at the time, not that the decision was necessarily a wise one. "The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision." *Brady* v. *United States,* 397 US 742, 757 (1970).

[6]

See Petitioner's Exhibit 2; Degree Hearing Transcript, p. 17.

time for two prior felony convictions (TR 43).[7] The Court in *Moore* noted "reasonable" defenses which might have been raised by counsel; insanity, because the defendant had told the judge he wanted to be examined, said there was something wrong in his head, and had previous "queer sensations," and mistaken identity, because the evidence was entirely circumstantial. In the instant case, despite counsel's suggestions to the contrary (TR 27, 40), there is no plausible basis for finding insanity, irresistable impulse, or anything other than first degree murder.[8] Furthermore, there was "crucial evi-

[7]

Also guilty plea convictions, at which, he alleged, he also did not have counsel (TR ?).

[8]

It is unclear whether the case against Petitioner here was entirely circumstantial (apart from his confession), although Petitioner's own newspaper exhibits suggest strongly it was not. The murders occurred one day after, and a short distance from where, Petitioner had escaped from prison and Exhibit 3 reported that Petitioner was arrested in Baltimore on the basis of a tip from an individual who said Petitioner identified himself as Howard Herrick (the name of the slain farmer) and who shortly thereafter saw Petitioner's picture in a crime magazine as wanted for the murders; the article also indicated that Petitioner's fingerprints were found at the scene of the slayings. As to the degree of the homicides, Petitioner's statement (Degree Hearing, TR, pp. 17-42) was that he came upon the victim's farmhouse, slept in the barn overnight, and planned to "knock out" the farmer and take his money and car, dropping a large chopping block on him from the rafters, knowing, however, that it would kill him if it hit him (Degree Hearing, p. 2). He found a ball peen hammer, set it aside, and waited all day for the man to come home from work. The victim eventually came into the barn, saw Petitioner, who said he was admiring the tools and, when the man glanced away, Petitioner struck him in the forehead with a grinder, again intending to knock him out. As he was getting the victim's wallet, the wife came in and Petitioner began hitting her with the hammer or the grinder, more than once because she didn't go down the first time. After she was down, the man started to get up and Petitioner hit him again with the grinder. The offenses as described by Petitioner clearly constituted first degree murder.

dence" (355 US at p. 162) in *Moore* from the Sheriff himself who admitted he told the defendant he might not be able to protect him from harm because he had information there were some black people who might "interfere" with him and other people from Holland who might attempt something. In the instant case, except for Petitioner's statement that there have been 50-100 people outside the jail (TR 20), and a newspaper account indicating "extra guards" were on duty (Exhibit 2), there was no evidence that Petitioner's life or safety were in danger. The undersigned does not believe that *Moore* requires reversal of the conviction in this case.

Secondly, Petitioner contends that his plea was not voluntarily and understandingly entered because it was without counsel and was the product of a coerced confession[9] and threats from law enforcement officials. The undersigned has already found that Petitioner voluntarily waived the assistance of counsel and that, under all the circumstances, counsel was not necessary to protect his rights. As to the confession, Petitioner indicated that the only physical abuse was at the hands of the Baltimore police who initially roughed him up a little. There was no abuse when he gave his first statement in the presence of the FBI agent, and no abuse when he gave his statement to the Michigan law enforcement people. From Petitioner's own testimony, and the record of his confession, the undersigned finds that his statement was not the product of law enforcement threats or coercion.

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[9]

Petitioner relies upon *Pennsylvania* v. *Claudy*, 350 US 116, 118 (1956), which did state that a conviction based upon a coerced confession could not stand. More recent decisions, however, indicate that the fact of a prior coerced confession, without motive, will not invalidate a guilty plea. *McMann* v. *Richardson*, 397 US 759 (1970); *Parker* v. *North Carolina*, 397 US 790 (1970). *McMann* distinguished *Claudy* on the grounds that the latter case involved a counselless plea (397 US at p. 767).

As to Petitioner's general allegations of feeling coerced into entering his plea, the Court does not find him to be a credible witness. In his sworn affidavit (Exhibit 1), which Petitioner said at the hearing was truthful (TR 35), he stated:

> "During the trial, Judge Marvin J. Salmon stopped the proceedings and took me into his office. There he told me, that if I wanted to protect my family and myself I had better go along with the program. Or, he'd send me back to Stockbridge and let the mob have it's way with me. He said we've had the police staying in your home with your wife and children for some time. Then I said, wait a minute Judge. I didn't do this and I don't want to hang for it, and I want a lawyer. He then told me, "we don't have the death penalty here in the state of Michigan so you won't need a lawyer. You'll be out in about ten years, if you keep your nose clean, and be able to get back to your family. So you had better go along with this, because we can't have you niggers going around killing white people, we just can't have that. A nigger did this, and we've got you."
>
> (p. 2)

In direct conflict therewith, Petitioner testified at the hearing that he never told the judge he wanted a lawyer (TR 33-34), and that he never told the judge he did not commit the crime (TR 62). Any suggestion that he pled guilty out of fear of the death penalty[10] also becomes suspect in light of his affidavit wherein he says the judge told him there was no death penalty in Michigan. Indeed, Petitioner never actually said that he entered his plea *because* of either the prior statement or fear of the death penalty.

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[10]

Which would not, per se, invalidate the plea anyway. *North Carolina* v. *Alford*, 400 US 25 (1970).

Petitioner's other expressions of fear or coercion were somewhat vague and unclear. He mentioned concern for his family, but they were in the Detroit area, not in Baltimore or Ingham County. His belief that things would go "easier" for him if he pled guilty was never really explained and his alleged fear of physical harm came down to a fear that the "system" (TR 63) would harm him.

The undersigned finds Judge Salmon to be a credible witness and flatly rejects Petitioner's claims that the judge ever threatened or verbally abused him in any way. Petitioner may well have been feeling alone, sorry for himself, and fearful of a substantial prison term, but the undersigned also finds that he was not coerced into pleading guilty and that his plea was a voluntary and intelligent act.[11]

Finally, Petitioner contends that he was denied due process by his absence and lack of counsel at the degree of guilt hearing. Again, the undersigned has already found his waiver of counsel to have been valid, and the evidence presented does not establish that Petitioner was, in fact, absent from the hearing. Neither Petitioner nor Judge Salmon could say definitely whether he was actually present at the hearing or not. However, the record reflects that Petitioner was brought before the Judge in Lansing on the morning of October 19, 1956. After the tender of his plea, and the in-chambers conference, the prosecutor indicated he would be ready to proceed with the degree hearing at about 11:00 a.m. that same morning (Arr. Plea., p. 3). The hearing began at 11:10 a.m. with the statement:

> "I should like to have the record show that this is the Hearing on the Determination of the Degree of Guilt of

[11] *Brady* v. *United States*, 397 US 742, 747 (1970); *McMann* v. *Richardson*, 397 US 759, 772 (1970); *North Carolina* v. *Alford*, 400 US 25, 31 (1970).

> the respondent, Nealy Joseph Buchanon, who is before the Court charged with the murder . . ."
>
> (Degree Hearing TR, p. 3)

At the conclusion of the hearing, the Court stated:

> "It is the judgment of this court that the murder of Myra Herrick was murder in the first degree, and it is also the judgment of this court that the murder of Howard Herrick was murder in the first degree.
>
> Will you step up here, Mr. Buchanon? The Court will sentence you."
>
> (Degree Hearing TR, p. 49)

While the record, too, is not absolutely clear, it does strongly suggest that Petitioner was present at the hearing, and the undersigned cannot find, as a matter of fact, that he was absent therefrom. While he may not have affirmatively advised Petitioner of his right to participate, Judge Salmon said that he certainly would not have denied him that opportunity if requested. In light of Petitioner's valid waiver of counsel, and considering that his (voluntary) statement clearly established first degree murder, the undersigned finds no constitutional infirmities in the degree of guilt proceedings.

For all of the foregoing reasons, then, the undersigned finds that Petitioner's guilty plea was entered knowingly, intelligently and voluntarily and, accordingly, recommends that the instant Petition For Writ of Habeas Corpus be dismissed.[12] While this 1956 plea may not comport with all of the present-

[12] This disposition renders it unnecessary to consider the effect of Rule 9(a) of the Rules Governing §2254 cases, dealing with delay-caused prejudice in Respondent's ability to answer the Allegations.

day requirements, the conviction remains sound and any relief to be accorded Petitioner must come from executive clemency, for which he is eligible.[13]

The parties are advised that any objections to this Report and Recommendation must be filed with the Court within 10 days after they are served with a copy, or further appeal from Judge DeMascio's acceptance thereof is waived.

Respectfully submitted,

Thomas A. Carlson /s/
THOMAS A. CARLSON
UNITED STATES MAGISTRATE

DATED: October 13, 1981

cc: Honorable Robert E. DeMascio
Frank Eaman, Esq.
Eric Eggan, Esq.

A TRUE COPY
THOMAS A. CARLSON
United States Magistrate

By S M S
Clerk

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[13]

Mich. Const. 1963, Art. 5, §14; MCLA 791.243, 244. The undersigned has been advised by the Michigan Parole Board that Petitioner is eligible for commutation consideration under their (present and proposed) Rules and Regulations, notwithstanding the trial judge's recommendation at sentencing to the contrary.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF INGHAM

THE PEOPLE OF THE STATE OF MICHIGAN VS. NEALY JOSEPH BUCHANON, Respondent.	Arraignment. #12396.

Proceedings had upon the Arraignment in the above-entitled cause before the Hon. Marvin J. Salmon, Circuit Judge, at Lansing, Michigan on October 19, 1956.

PRESENT:

Mr. Charles E. Chamberlain, Prosecuting Attorney in and for Ingham County,

Representing the People.

Mrs. Inez Swaninger, Deputy Clerk,

Mr. Burton Boone, Court Officer.

FILED—NOV 30 3:02 PH '56
C. ROSS HILLIARD—COUNTY CLERK
INGHAM COUNTY—LANSING, MICHIGAN

MR. CHAMBERLAIN: Let the record show this is the arraignment in the case of the People of the State of Michigan vs. Nealy Joseph Buchanon. You are Nealy Buchanon?

THE RESPONDENT: Yes, sir.

MR. CHAMBERLAIN: (Reading information charging a violation of Sec. 316 of Act 316 of the Public Acts of 1931, being C. L. 1948, 750.316, M. S. A. 28.548.

THE COURT: Do you understand the charge, Mr. Buchanon?

THE RESPONDENT: Yes, your honor.

THE COURT: The court wishes to advise you that you are entitled to be represented by a lawyer, and if you are not financially able to employ one and will so advise the court, the court will see that you have a lawyer. Do you understand that?

THE RESPONDENT: Yes, sir.

THE COURT: The court also wishes to inform you you are entitled to have a trial, either before a jury or before the court without a jury. Do you understand that?

THE RESPONDENT: Yes.

THE COURT: How do you wish to plead, guilty or not guilty.

THE RESPONDENT: Guilty, your honor.

THE COURT: Has anyone made you any promise of any kind to induce you to plead guilty?

THE RESPONDENT: No, sir.

THE COURT: Has anyone stated to you if you would plead guilty he would secure leniency from the court?

THE RESPONDENT: No, sir.

THE COURT: Then are you pleading guilty because you actually are guilty?

THE RESPONDENT: Yes, sir.

THE COURT: Very well.

(Conference in chambers.)

THE COURT: Let the record show that the court has conferred with the accused relative to the circumstances in each one of these crimes, is convinced that he committed the crimes, and that his plea was freely, understandingly and voluntarily made, without undue influence, compulsion or duress and without promise of leniency. Therefore his pleas are accepted and he is remanded to the custody of the county sheriff to await the taking of testimony of witnesses to determine the degree of the crime, and for sentence.

MR. CHAMBERLAIN: Shall we set that time now, your honor?

THE COURT: Yes.

MR. CHAMBERLAIN: May it please the court, I should like to state that we are hoping to be able to proceed as far as the prosecution is concerned by 11 o'clock this morning.

THE COURT: Very well; let me check with the assignment clerk.

I, Marvin J. Salmon, Circuit Judge in and for the 30th Judicial Circuit of Michigan, do hereby certify that the above stenographic record is a true record of the proceedings had.

Marvin J. Salmon /s/
Circuit Judge.

STATE OF MICHIGAN }
COUNTY OF INGHAM }

I, Paul Skarstad, an official court reporter in and for the 30th Judicial Circuit, do hereby certify that I reported the proceedings had upon the arraignment in the case of the People of the State of Michigan vs. Nealy Joseph Buchanon before the Hon. Marvin J. Salmon, Circuit Judge, at Lansing, Michigan on October 19, 1956; and that the above and foregoing typewritten transcript is a true, correct and accurate record of my transcribed notes made of said proceedings.

Dated this 29th day of November, 1956.

Paul Skarstad /s/
Paul Skarstad,
311 City Hall,
Lansing, Mich.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF INGHAM

THE PEOPLE OF THE STATE OF MICHIGAN v. NEALY JOSEPH BUCHANON, Respondent.	No. 12397

HEARING TO DETERMINE DEGREE OF GUILT and SENTENCE

Testimony taken and proceedings had upon the Hearing to Determine Degree of Guilt and Sentence in the above-entitled cause before the Hon. Marvin J. Salmon, Circuit Judge, at Lansing, Michigan, on Friday, October 19, 1956.

APPEARANCES:

CHARLES E. CHAMBERLAIN, Esq.,
Prosecuting Attorney,

JACK W. WARREN, Esq., Ass't Prosecuting Attorney,

PETER J. TRELEAVEN, Esq.,
Ass't Prosecuting Attorney
Representing the People.

Willard I. Barnes, Ingham County Sheriff.

Inez Swaninger, Deputy Clerk.

Burton Boone, Court Officer.

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INDEX OF EXHIBITS

Lansing, Michigan
Friday, October 19, 1956,
11:10 o'clock a.m.

THE COURT: You may proceed.

MR. CHAMBERLAIN: I should like to have the record show that this is the Hearing on the Determination of the Degree of Guilt of the respondent, Nealy Joseph Buchanon, who is before the court charged with the murder of Myra Herrick on one information and Howard Herrick on another information, pursuant to the statutes of the State of Michigan.

At this time, your Honor, I should like to move that these two cases be consolidated for the purpose of this hearing to determine the degree of guilt of the respondent.

THE COURT: Very well. Your motion is granted.

MR. CHAMBERLAIN: Lieutenant Babcock, please, or excuse me, Captain.

VERSILE D. BABCOCK, was thereupon called as a witness in behalf of the People, and being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CHAMBERLAIN:

Q. Your full name and address, please, witness?

A. Versile D. Babcock, of 834 South Barnes, Mason, Michigan.

Q. And where are you employed?

A. With the Ingham County Sheriff's Department.

Q. And you were employed with the Sheriff's Department in September, 1955?

A. Yes, sir.

Q. Have you ever had occasion to know Howard Herrick and Myra Herrick?

A. Yes, sir.

Q. Would you tell the court when you first became acquainted with them?

A. About September, 1954.

Q. Now, in the course of your duties did you have occasion to go to the Herrick farm in September, 1955?

A. I did.

Q. Will you tell us when it was?

A. It was on September 5, 1955, at approximately 11:00 P.M.

Q. And why did you go there?

A. Upon the request of a son and daughter, to assist them in locating their parents.

Q. And who went with you?

A. I had a National Guard man with me and also Deputy Gannaway and another patrol car.

Q. Now, when you arrived, tell us what you did?

A. We first went into the house. The daughter and a son was with us at the time. We examined the house to determine if they had just gone away possibly for the week end. We found everything in order. The windows were open. The doors were open. And while we were checking the house Deputy Gannaway and one of the—Howard Herrick, or Harold

Herrick went out into the barn to check the barn on routine investigation.

Q. Did there come a time when you went to the barn yourself?

A. Yes, sir.

Q. And tell us of your inspection of the barn?

A. I went out to the barn and I found a 1952 DeSoto automobile just inside the door of the barn, and underneath some baled hay I found the bodies of Howard and Myra Herrick.

Q. And you have testified that you had known them previously?

A. Yes, sir.

Q. Were you able to identify the bodies there as the Herricks?

A. I did; yes, sir.

Q. Now, will you describe the condition of the bodies, please?

A. The bodies were — Mr. Herrick's was extremely bloated. It had started to decompose. It turned what we say black. He had been— his head had been beaten, and quite a bit of blood around. Mrs. Herrick was laying face up and she had extremely — quite a few blows on her head.

Q. Now, beyond the finding of the bodies did you inspect the barn otherwise?

A. Yes, sir, I did.

Q. What did you find on your inspection of the barn?

A. I found a bloody hammer. I found a grinding wheel. I found some clothing. Also Mr. Herrick's driver's license in the northeast part of the barn. I found some book matches on top of the hay loft. Also found some foreign cigarette butts.

Q. That is sufficient for now, witness.

MR. CHAMBERLAIN: Will you mark this, please?

(Hammer produced was thereupon marked as People's Exhibit No. 1.)

Q. (By Mr. Chamberlain, continuing): I hand you People's Exhibit 1 here and ask if you can identfy it?

A. Yes, sir; I can.

Q. What is it?

A. That is the hammer that was at the Herrick barn on the night of September 5th.

Q. And where has it been since you found it?

A. It has been — was in our custody aud turned over to the State Crime Lab, Dr. Muehlberger.

Q. And since it was returned it has been in your custody?

A. Yes, sir.

MR. CHAMBERLAIN: Now, mark this, please.

(Grinding wheel produced was thereupon marked as People's Exhibit No. 2.)

Q. (By Mr. Chamberlain, continuing): I hand you People's Exhibit 2 and ask you if you can identify it, please, Captain?

A. Yes, sir; I can.

Q. What is it?

A. That is a grinding wheel for sharpening knives and so on, and that was at the barn on September 5, 1955, and it has been in our custody ever since.

Q. That is the Sheriff's Department?

A. Yes, sir.

Q. Until you came to court this morning?

A. That is correct.

MR. CHAMBERLAIN: Now, will you mark those, please?

(Three photographs produced were thereupon marked as People's Exhibits Nos. 3, 4 and 5.)

Q. (By Mr. Chamberlain, continuing): I hand you People's Exhibits 3, 4 and 5 and ask you if you can identify these photographs?

A. Yes, sir; I can.

Q. What are they, Captain?

A. They are photographs that I took of the Herrick barn.

Q. When?

A. That was on the early morning of September 6, 1955.

Q. What do they show?

A. Exhibit 3 shows — the photograph was taken from the top of the barn looking down. It shows the entrance way to the barn coming in from the north. It shows a hay loft, a fork. It shows a block of wood up on a rafter in the barn.

Q. Well, that is sufficient for the moment. You took these pictures?

A. Yes, sir; I did.

Q. Now, may I have them, please?

A. (Returning exhibits to Mr. Chamberlain.)

Q. You say that they show a block of wood up on the rafter in the barn. Did you see that there yourself?

A. I did.

Q. Would you describe it, please?

A. Yes, sir. It's a — it looks like a tree trunk, a large tree trunk, perhaps 2 to 3 foot across the top of it. It had feathers on it from chickens and blood. And it was approximately 3 foot in height. I don't know what kind of wood it was.

Q. Did you find any identification on the person of Mr. Herrick?

A. No, sir.

Q. By that I mean a billfold or any papers identifying who it was?

A. Not on Mr. Herrick's body; no, sir.

THE COURT: Mr. Babcock, did you take the pictures, Exhibits 3, 4 and 5?

A. I did; yes, sir.

Q. Those pictures, do they accurately or properly reflect the conditions that you found in the barn at the time that you took the pictures?

A. They do; yes, sir.

Q. Now, you were present at the Sheriff's office yesterday afternoon in Mason at the time the respondent was there, is that correct?

A. Yes, sir.

Q. And were you there when he gave a statement in the presence of Mr. Paul Skarstad, a circuit court reporter?

A. Yes, sir; I was.

Q. Throughout that proceeding, is that correct?

A. Yes, sir.

MR. CHAMBERLAIN: Does the court have any questions of this witness?

THE COURT: I have no questions. That is all.

(Thereupon the witness was excused.)

MR. TRELEAVEN: Dr. Black.

CHARLES A. BLACK, was thereupon called as a witness in behalf of the People, and being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TRELEAVEN:

Q. What is your name, please?

A. Charles A. Black.

Q. And your occupation, sir?

A. My occupation is the practice of medicine.

Q. And what is your specialty, if any?

A. My specialty is pathology.

Q. That consists mainly of what field of medicine, Doctor?

A. Pathology has to deal with the diagnosis of disease, the determination of the cause of death, and examination of—

Q. (Interposing): And how many years have you been actively engaged in that occupation?

A. I have been engaged in pathology approximately 18 years.

Q. And you are head of the Sparrow Hospital Department of Pathology?

A. Yes. That's right.

Q. Now, Doctor, in the course of your duties were you called upon to perform an autopsy on a white female, Myra Herrick?

A. Yes, I was.

Q. That was performed on or about September 6, 1955, was it not?

A. Yes. That's right.

Q. What was the condition of the body as you found it, Doctor?

A. Well, the body showed advanced post mortem changes. The abdomen was particularly swollen; face swollen.

Q. Did you see any evidence of physical violence on the body?

A. Yes, I did.

Q. Where?

A. The right side of the head showed a very violent crushing injury with very extensive fracture, and brain tissue was exuding out through the defect.

Q. In your opinion, Doctor, was that injury sufficient to have caused death?

A. Yes.

Q. In your opinion, was that the cause of death of this party?

A. Yes, that is my opinion that it was the cause of death.

Q. Did you also examine the body of a white male American by the name of Howard Herrick?

A. Yes, I did.

Q. Did you find any injuries on that body?

A. Yes. I found a very violent crushing injury of the left side of the head with extensive fractures and brain tissue also exuding from the defect of the skull.

Q. And was that injury, in your opinion, sufficient to have caused death?

A. Yes, it was.

Q. In your opinion, did that cause death?

A. Yes. That is my opinion.

Q. Now, did you find any evidence of any bruises or contusions on or about the arms of either of the subjects?

A. Yes, I found numerous injuries about the entire body of Mrs. Herrick. She had several hammer-like blow injuries to both eyes and one in front of the ear, and she had numerous bruises about the hands and wrists. She had a wrist watch on the left wrist and that was broken, and her glasses were broken.

Q. What, if anything, did the injuries on the arms indicate to you, Doctor?

A. Well, it indicated to me that she had been involved in a very violent prolonged struggle.

Q. Apparently trying to ward off blows?

A Yes. That would be my opinion.

MR. TRELEAVEN: Does the court have any further questions of the Doctor?

THE COURT: In your opinion, Doctor, could either one or any of the wounds that you saw on either or both of the persons here involved be caused by either one or both of the instruments that you see before you there?

A. Your Honor, it is my opinion that the ones on the skull could have been inflicted by a hammer. They were very violent, and the fractures of the skull radiated in all directions, and the marks on the forehead particularly had the oval shape of a hammer.

THE COURT: By this you are referring to People's Exhibit 1?

A. Yes. That's right, your Honor.

THE COURT: For the record, Doctor, in your opinion about what is the weight of that hammer?

A. It would be my estimate it is about three-fourths of a pound, or heavier, or a little heavier.

THE COURT: I have nothing further.

Q. (By Mr. Treleaven, continuing): Doctor, if the record should later indicate that certain blows were delivered to the skull of Mr. Herrick by that grinding wheel, would that be consistent with your findings?

A. Oh, I think it could be, yes.

MR. TRELEAVEN: All right. I have no other questions.

MR. TRELEAVEN: Thank you, Doctor.

(Thereupon the witness was excused.)

MR. WARREN: The People would like to call Paul Skarstad, please.

Mark this, please.

(Stenographic statement of Nealy Joseph Buchanon produced was thereupon marked as People's Exhibit No. 6.)

PAUL SKARSTAD, was thereupon called as a witness in behalf of the People, and being first duly sworn, testified as follows:

MR. WARREN: May it please the court, before examining this witness, I am not certain whether these exhibits have in fact been offered and received, and so I would move at this time that all of the People's Exhibits 1 through 5 be admitted in evidence.

THE COURT: They are received.

DIRECT EXAMINATION

BY MR. WARREN:

Q. Witness, will you state your full name, please?

A. Paul Skarstad.

Q. And your occupation is what?

A. Official Court Reporter for this circuit.

Q. And have you been employed and trained in the matter of taking stenographic notes of conversations?

A. Yes, sir.

Q. How long have you been employed at that type of work?

A. Since March, 1931.

Q. Witness, I hand you what has been marked People's Exhibit 6. I will ask you if you recognize what that instrument is?

A. Yes, sir.

Q. What is that?

A. It's a statement of a conversation between Jack W. Warren and Nealy Joseph Buchanon.

Q. And do you recall where that conversation took place?

A. Yes.

Q. And where was that?

A. In the Sheriff's office of the Ingham County Jail.

Q. And does that indicate when that conversation took place?

A. The statement was started at 5:24 p. m. October 18, 1956.

Q. I call your attention to that signature on page 29, the final page of that instrument, and ask you if that is your signature?

A. It is.

MR. WARREN: At this time I would ask, your Honor, that People's Exhibit No. 6, a stenographic report of the statement and conversation between myself and the defendant, be admitted in evidence.

THE COURT: It is received.

MR. WARREN: Nothing further. Does the court have any questions of the witness?

THE COURT: I have no questions.

MR. WARREN: Nothing further.

(Thereupon the witness was excused.)

MR. CHAMBERLAIN: Would the court like to have an opportunity to read that statement before we proceed?

THE COURT: Yes. Maybe I had better look it over. (Court examining Exhibit No. 6.)

I think that perhaps this should be read into the record, Mr. Warren.

MR. WARREN: All right, your Honor.

Do you want to read it?

MR. CHAMBERLAIN: Yes.

This is the Statement of Nealy Joseph Buchanon, which has been identified as People's Exhibit 6, and which has been received in evidence by the court.

(Reading):

"Stenographic report of a conversation between Mr. Jack W. Warren and Mr. Nealy Joseph Buchanon, held at the Ingham County Jail, Mason, Michigan on Thursday, October 18, 1956, beginning at 5:24 p.m.

"PRESENT:

"Mr. Jack W. Warren,

Mr. Nealy Joseph Buchanon,

Sheriff Willard Barnes,

Captain Versile Babcock,

Mr. Peter Treleaven.

"MR. WARREN: Let the record show, Nealy, this is Mr. Skarstad, who is a court reporter. Do you understand that?

"NEALY BUCHANON: Yes.

"MR. WARREN: Now you understand too this is Sheriff Barnes sitting here and this is Mr. Treleaven, and this is Deputy Babcock. I think I have introduced myself. I am Jack Warren of the Prosecutor's office. You understand each one of our capacities, the job we hold, do you?

"NEALY BUCHANON: Yes.

"MR. WARREN: Do you understand further that this statement must be given by you voluntarily?

"NEALY BUCHANON: Yes.

"MR. WARREN: In other words, we cannot force you to give a statement, so if you want to tell us something you must do so voluntarily. Do you understand that?

"NEALY BUCHANON: Yes.

"MR. WARREN: Do you understand further that this statement may be used either for you or against you? Do you understand that?

"NEALY BUCHANON: (Written with pen) Yes N.J.B."

I might indicate for the record that in the stenographic report of this that that answer to that question was left blank, and it was later filled in as "Yes" by Nealy Buchanon, and that he has initialled it "N. J. B." adjacent to writing that last answer in.

(Continuing reading):

"MR. WARREN: Now, let me ask you this: Has anyone made you any promises in return for your giving us this statement?

"NEALY BUCHANON: No, sir.

"MR. WARREN: Has anyone used any physical force on you to get you to give us this statement?

"NEALY BUCHANON: No, sir.

"MR. WARREN: Do you give this statement of your own free will, freely?

"NEALY BUCHANON: Freely and voluntarily.

"Q. (By Mr. Warren) Your full name is what?

A. Nealy Joseph Buchanon.

Q. You spell Nealy how?

A. N-e-a-l-y.

Q. What is your middle name?

A. Joseph.

Q. And your last name Buchanon?

A. Yes.

Q. You spell that how?

A. B-u-c-h-a-n-o-n.

Q. Now, Nealy, how old a man are you?

A. 32.

Q. All right. Are you married or single?

A. Married.

"Q. Now I think probably, Mr. Skarstad, your record should show that the time is 5:24 p.m., October 18, 1956. You are married or single, Nealy?

A. Married.

Q. Your wife lives where?

A. In Detroit. Pardon me, Sheriff Barnes, was that the same address in Detroit ?

"SHERIFF BARNES: No, she has moved.

"NEALY BUCHANON: Can you give me the address?

Q. (By Mr. Warren.) As near as you know she last lived in Detroit, is that correct?

A. Yes.

Q. Nealy, do you remember September of 1955?

A. Yes, sir.

Q. At about that time you were an inmate of Jackson Prison, were you not?

A. Yes, sir.

Q. You would be in Jackson Prison at the time?

A. Yes.

Q. Did there come a time when you left Jackson Prison?

A. Yes, sir.

Q. What date was that, as near as you can remember?

A. It was on or about the 2nd of September, the first or 2nd of September.

"Q. That would be 1955.

A. 1955.

Q. How did you accomplish your leaving of Jackson Prison?

A. Drove . . drove away a truck, an institution truck.

Q. Now, about what time of the day was it when you drove this truck off?

A. About 4 o'clock in the morning.

Q. Where did you drive it? Where did you drive the truck as near as you can remember?

A. Well, I was headed away from Jackson, going by the prison. I don't know which direction.

Q. Did there come a time when you left the truck?

A. Yes.

Q. Abandoned it?

A. Yes.

Q. Could you describe the land or terrain where you left the truck?

A. Yes, I left it behind a large building. I thought it was a school building, in the back area of the building.

Q. Was it an open field?

A. Yes, it was open.

Q. After leaving the truck how did you proceed?

A. Walking through the fields, the wooded areas.

"Q. Did you remain in the fields and wooded areas?

A. As much as possible.

Q. As much as possible. Now did there come a time when you found or came upon a farmhouse?

A. Yes.

Q. And what sort of a road was that farm located on?

A. It was a blacktopped highway.

Q. Was it near an intersection?

A. Yes.

Q. Do you recall offhand whether the nature of the buildings, what the nature of the buildings were at that intersection?

A. Yes, there is a gas station and a barn and a couple of houses.

Q. All right. Now when you arrived at that farm, was it dark or light?

A. Dark.

Q. So you had been an entire day getting to that farm, is that correct?

A. Yes, sir.

Q. Now, you arrived at the farm at dark?

A. Yes, sir.

Q. And what did you first do? As you arrived at that farm?

A. Walked by the house and looked in and I headed for the barn.

"Q. Excuse me. This was a wooden farmhouse, was it?

A. Yes.

Q. A wooden barn, which you have mentioned?

A. Yes.

Q. You walked by the house and looked in and then you did what?

A. Walked to the barn.

Q. Was that barn open or closed?

A. The door was open.

Q. It was open. All right. Now, what if anything did you do in the barn?

A. Well, there was a car sitting in the doorway and I looked over the car and looked in it.

Q. All right. When you looked in the car for what purpose did you look in it?

A. I had some cigarets I wanted to smoke and I was mainly looking for a match, in the car.

Q. Did you find a match?

A. There was a book of matches laying on the floor.

Q. You did find a match. At a time after that you had a smoke in the barn?

A. Yes, sir.

Q. Now after locating a match what did you next do?

A. Well, I stood there for awhile, thinking, trying to figure out a way to get away from around that area, and I decided I would lay down and go to sleep that night.

"Q. Did you lie down and go to sleep?

A. Yes, I went in the back of the haystack and arranged it so I wouldn't be seen and laid down there, and I went to sleep after awhile.

Q. You say you laid down in a place where you couldn't be seen?

A. Yes.

Q. Was that behind some bales of hay?

A. Yes.

Q. Could you see the door of the barn?

A. I fixed it so I could see it.

Q. Could you see the farmhouse?

A. I couldn't see the farmhouse; no.

Q. You say you then fell asleep or you laid there and eventually fell asleep?

A. Yes.

Q. Were you disturbed by any person during that evening?

A. No, not that evening.

Q. When you awoke, was it daylight or dark?

A. It was still dark.

Q. Still dark. What did you then do?

A. The first thing I did was come up and look out the doorway and try to figure out what time it was. It was still dark. I looked out there and it was dark and I saw the farm-

house. The light was on and the people were stirring around in there, so I decided I would fix things as I planned, to get this car and get some money so I could leave Michigan.

"Q. Let me understand this: You figured and planned by which you could get a car and some money, is that right?

A. Yes.

Q. What was that plan, Nealy?

A. To knock out the man and take his money.

Q. How did you intend to do that?

A. Well, I thought I would grab something.

Q. How did you intend to knock out the man?

A. Hit him with something.

Q. Did you take any steps toward setting that situation up?

A. It didn't look so hot because he might see me or might hear me and I thought of something else. They had a big chopping block to dress his chickens with or something of that sort, and I decided to move that up on the rafters and when he come in I would drop it down on him and knock him. I would almost kill him.

Q. You would almost kill him?

A. If that block hit him it would have killed him.

Q. After that was done you would get his money and car and leave, is that it?

A. Yes.

"Q. Now, do I understand this: You moved that block up onto the rafter or beam? Overhead?

A. Yes.

Q. Did you get up on the rafter or beam?

A. Right.

Q. All right. Now, do you remember, or did there come a time when a man came into the barn?

A. Yes.

Q. And did he rummage around and work about the car?

A. Yes.

Q. What was he doing?

A. He was removing some bags of some kind, food, from the car.

Q. To your knowledge, did he see you?

A. No, he didn't see me.

Q. Did there come a time when he left the barn?

A. Yes.

Q. Where did he go?

A. He went back in the house.

Q. All right. What did you do?

A. I stayed up there.

"Q. For how long?

A. Just about 15 minutes. No, I stayed up there until after he drove off the second time with the car.

Q. You stayed up there until he drove off. Now, after he drove off, did you get down?

A. Yes.

Q. Did the block remain up there?

A. Yes.

Q. What did you do when you got down?

A. Well, I come down and walked around a little bit and said to myself: 'That has gone by. Couldn't do that,' so I decided I would stick around awhile until I got a chance to get out. It was getting quite light then. I would stick around until I got a chance to get away and during the course of that time I kept my eye on the house and I noticed the woman was getting ready to leave, was coming out of the house, and I said, 'Well, I will go in the house and get me something to eat and get some clothes and get ready to get out of there.'

Q. You then watched the woman leaving and you contemplated or figured on going into the house and getting what?

A. Clothes, food and money, if there was any there.

Q. Did you go into the house?

A. Yes.

Q. Did you get any of those items?

A. I got clothes, food and there wasn't no money laying around. Pennies, but I didn't want to fool with a lot of pennies.

"Q. You got some clothes. What kind of clothes?

A. A pair of trousers and a shirt and jacket.

Q. Did you put those clothes on in the house?

A. No, I put them on in the barn.

Q. Did you get anything to eat?

A. Yes, I got a tomato and an egg.

Q. Did you get anything to drink?

A. A bottle of beer to drink.

Q. Then after you got those clothes, do I understand you went back to the barn?

A. Yes.

Q. You changed your clothes there?

A. That is when I changed.

Q. What did you do with your old clothes?

A. I threw them in the closet somewhere where they kept the old dirty clothes. In the clothes closet.

Q. Was that in the barn or the house?

A. It was in the house.

Q. Did you go back to the barn and change clothes and then bring the old clothes back to the house, or did you put your clothes on in the house?

A. I changed them in the house.

"Q. You changed them in the house?

A. Right.

Q. And threw your old clothes in the closet, is that right?

A. Yes.

Q. Now, when you returned to the barn, what did you do?

A. I said I would lay around waiting until he got off from work.

Q. You figured you would lay around until he got off from work. That is the man who had been there earlier?

A. Yes.

Q. Did you remain in the barn?

A. Right.

Q. Now, were there certain tools in that barn?

A. Yes, sir.

Q. Did there ever come a time when you looked over those tools?

A. Yes, sir; I was looking them over.

Q. Did you take any of those tools?

A. Yes.

Q. What did you take?

A. I think I took that hammer there, and laid it somewhere.

Q. Was that a ball peen hammer or a claw hammer?

A. A ball peen.

"Q. Now, what did you do next, Nealy?

A. I rummaged around the barn for a while looking around in there and sat down and smoked and laid down and rested. You know, just laying around in there, doing nothing much. Just laying in there.

Q. Was that waiting for the man to come back?

A. Yes.

Q. About how long did you wait in the barn?

A. Well, all day until that evening.

Q. So you remained all day waiting for the man to come back, is that right?

A. Yes.

Q. And you remained in the barn?

A. Yes, sir.

Q. Now, did there come a time when the man did come back?

A. He came back that evening.

Q. Was it daylight or dark?

A. It was daylight.

Q. Now, where were you when you first became aware that he had returned?

A. Over by the tool bench.

Q. I understand, by the tools, is that correct?

A. Yes.

"Q. Had you taken this hammer away from the tool bench before this?

A. I think so. That must have been when I took it.

Q. Do you know what you did with it when you took it away?

A. I think I laid it somewhere near where I could get it in case he came in. I would be at the advantage, where I could see him and he couldn't see me.

Q. Now, when you first saw him and you were standing by the tools, where was he?

A. He was in his car, just driving in.

Q. He drove the car into the barn?

A. Yes.

Q. What type of car was this?

A. It was a DeSoto, green.

Q. Was there anyone else in the car with him when he drove in?

A. No.

Q. When he drove in what did you do?

A. I realized he was in. He stopped the car and was opening the door and he came a . . I came around the tool bench and walked around him and met him as he was getting out.

Q. Did you walk around the front of the car or the back of the car?

A. I walked around the back.

"Q. And you say you approached him as he was getting out of the car?

A. Yes.

Q. Did you say anything to him or did he say anything to you?

A. He spoke to me and asked me what was I doing there.

Q. He asked you what you were doing there? What did you say?

A. I told him I was admiring his tools and I had that in my hand.

Q. By that, what do you mean?

A. The grinder.

Q. You had a grinder in your hand?

A. Yes.

Q. And you told him you were admiring his tools, is that right?

A. Yes.

Q. When did you then say or what did he say?

A. I asked him, did he want to sell it.

Q. What was his response?

A. No, he didn't want to sell it.

Q. What next happened?

A. He sort of turned his head and I struck him with it.

"Q. Where did you strike him?

A. In his forehead, I think.

Q. With the grinder?

A. With the grinder.

Q. What happened to the man?

A. He fell down.

Q. Now, at the time you struck him, Nealy, what were your thoughts or intentions? Why did you strike him?

A. To knock him out and get his money and his keys to his car and leave.

Q. Now, this man was about how old a man?

A. I imagine about 52.

Q. All right. How was he dressed?

A. He was dressed in khakis, grey or green, I am not sure of the color, but he had khakis on, and he had a jacket on top of the khakis. He had a cap on or a hat on.

Q. After the man was struck, you say he fell to the floor?

A. Yes, sir.

Q. Did he remain there?

A. Yes.

Q. Was he breathing, do you know?

A. He was breathing.

"Q. All right. What next happened? What did you do then?

A. I reached down and turned him over so I could get his wallet.

Q. Did you start to get the wallet?

A. I started to get the wallet.

Q. Did you get hold of it?

A. I just felt it and reached in to grab it. That is when his wife came in.

B. How was his wife dressed?

A. She had a sort of a flowery dress with an apron on it.

Q. Can you tell me about how old a woman she was, or what she looked like?

A. She was about 48 years old, a short woman, dark haired.

Q. Now, was this daylight or dark?

A. It was daylight.

Q. Let me ask you this, Nealy, do you specifically remember the color of this woman's hair?

A. I am not certain. It seemed to me like it was brownish sort of like, like his hair.

Q. Could it have been lighter in color, grey?

A. It could have been. I don't know.

Q. You say it could have been?

A. Could have been. I am not sure, but I think it was like that.

"Q. You say the man's wife came in, is that right?

A. Yes.

Q. All right. Did she say anything to you or did you say anything to her?

A. She said, 'What is happening here?' I didn't say nothing to her. I just started hitting her.

Q. Was she standing right at the side of you?

A. Right behind me. She come up on the side. I was facing him this way. She came in about from here to that doorway there, and asked what was happening. I rose up and started towards her and she sort of looked around and seen him and started screaming.

Q. She said, 'What is happening here,' and then started screaming after she had seen the man?

A. Yes.

Q. You then went towards her?

A. Yes.

Q. What did you tell her?

A. I struck her.

Q. Do you know with what?

A. It was either that weapon or that thing there. I am not sure.

Q. Either the grinder or the hammer?

A. Yes, or the hammer.

"Q. What did the woman do you as you approached her?

A. She put her hands up when she seen me get ready to strike her. She put her hands up like that.

Q. You then did strike her?

A. Yes.

Q. What did she do?

A. She kept on screaming.

Q. What did you do?

A. I hit her again.

Q. Did she fall after the second time?

A. She fell, yes.

Q. Now, do you specifically remember whether she was hit two times, or could she have been hit more times?

A. She could have been hit more times, but I know it was two times because the first blow didn't get her right or something, and she started screaming and I hit her again. I could have hit her again; I am not sure.

Q. You could have hit her more than two times?

A. I could have hit her more than two times, but I know I hit her twice.

Q. What else happened then?

A. Well, after she fell, I looked around and he was getting up and coming towards me.

Q. That is the man whom you had hit earlier?

A. Yes.

"Q. He was getting up and coming toward you then?

A. Yes.

Q. What did you do?

A. I hit him.

Q. With what?

A. Whatever I had. I think I had. . . I still think I had that thing.

Q. You are referring to the grinder?

A. The grinder.

Q. Then what did he do?

A. After I hit him, he fell down again and laid there.

Q. Now, did you notice whether the man was still breathing?

A. Yes, seemed like he was breathing to me at that time.

Q. Was there anything unusual about that breathing?

A. Sort of a rattle.

Q. Sort of a rattle. What about the woman?

A. She was quiet.

Q. Were either of these people bleeding?

A. They were bleeding slightly about the head.

Q. Both of them?

A. Yes.

"Q. What did you then do?

A. I went through the man's pockets and got his money, his wallet, cigaret lighter and his watch.

Q. After getting these items what did you do then?

A. Well, I thought I would move them out of the doorway in case anybody would see them. I pulled them around some bales of hay there in the barn.

Q. Did you put any hay on the people after that?

A. After I pulled them around I put some hay on them.

Q. To cover them up?

A. Covered them up.

Q. Were both of them breathing at that time, do you know?

A. I don't think so. Both of them were quiet. I am not sure whether they were breathing or not.

Q. After having moved their persons or their bodies, what did you then do?

A. I went through the car looking around for the keys.

Q. Did you find the keys.

A. No.

Q. Did you take any steps to start the car?

A. I tried to cross the wires but I didn't know how to do it.

Q. Did you ever succeed in starting the car?

A. No, sir.

"Q. What did you then do?

A. I walked out of the barn and crossed the field, crossed the cornfield.

Q. Now, you have indicated that you removed certain items and things from the man's person. Did you keep all those items or did you discard any of them?

A. I discarded his bank book and his check book, I think, in the field.

Q. His bank book.

A. And check book.

Q. In the field. About how far would that be from the farmhouse, if you remember?

A. About a block, I imagine.

Q. Where did you then go?

A. I cut across the cornfield over to a store, across the highway on the right hand side.

Q. You went to a store. What did you do at the store?

A. I bought a pie.

Q. Did there come a time when you left the store?

A. I caught a ride going into Mason.

Q. What sort of a vehicle was it?

A. In a pick-up truck.

Q. Was there more than one occupant in the truck?

A. Two.

"Q. Were they men or women?

A. Men.

Q. You say they gave you a ride to Mason?

A. Yes.

Q. Where did you go in Mason?

A. The bus terminal. The bus station.

Q. What was your intention when you went to that bus station?

A. To catch a bus to Lansing.

Q. Did you catch a bus?

A. No.

Q. Did you get to Lansing?

A. Yes.

Q. How did you get to Lansing?

A. I caught a cab.

Q. How many men were in the cab?

A. Two.

Q. Two of them? drove you to Lansing?

A. One was driving and the other was just company.

Q. Was it daylight or dark when you were taken to Lansing in the cab?

A. It was daylight. Dusk. About like it is now.

"Q. About dusk. When you got to Lansing, where did you go?

A. The bus terminal.

Q. What was your intention when you went to the bus terminal?

A. To get a ticket to Chicago.

Q. Why did you want to go to Chicago?

A. I just thought Chicago would be a good place to go.

Q. Did you have any specific reason for wanting to go to Chicago?

A. Yes, it is a good big city and I figured there would be more trouble trying to find me in a big city than there would be in a small one.

Q. Did you get a bus to Chicago?

A. No. The bus was leaving too late. I decided on one to New York.

Q. You mean you didn't want to wait around the bus station?

A. That is right.

Q. So did I understand you to say you got a bus for New York?

A. Yes.

Q. Did you go to New York?

A. Yes.

"Q. Now, as near as you recall, Nealy, how much money did you have on you when you drove this truck off?

A. About $43.

Q. I don't think you understood me. When you drove the truck away from Jackson.

A. I had two dollars.

Q. How much money was in the purse or pocketbook of the man there at the farm?

A. $45.00.

Q. That is the man whom you struck?

A. Yes.

Q. So that you had approximately $47 total when you left the farm?

A. Yes.

Q. Did you use some of this money to go to New York?

A. Yes.

Q. What did you do in New York?

A. I got me a job at a cafe-diner, in Brooklyn.

Q. After being in New York, where did you go?

A. I worked out at Brooklyn one day and then I dec'ded to come back to New York. I stayed in New York three or four more days getting enough money to go, to get out of New York, and I left and caught a bus and headed toward North Carolina and stopped off in Baltimore.

"Q. What was your purpose in stopping off there?

A. To get a job and make some money so I could carry on down.

Q. As I understand it, you were picked up in Baltimore?

A. Yes, sir.

Q. Now, just reviewing for the moment, Nealy, you would have been at this farmhouse on either September 2nd or 3rd, is that right?

A. Right.

Q. Can you tell me now specifically whether it was September 2nd or September 3rd.

A. I can't be positive about that.

Q. But it would be one of those two days?

A. One of those two days.

Q. In regard to the changing of your clothes, Nealy, could it have been that you hit this man and this woman first and then changed your clothes?

A. Might have but I don't think so. I think I changed my clothes.

Q. You think you changed your clothes first?

A. My clothes first.

Q. All right. Now, besides the money that was in this purse, were there any other items?

A. Yes, an identification card and a union card and some more stuff. He had a driver's license, I remember.

"Q. What did you do with his identification?

A. I kept it.

Q. Did you ever make use of that identification?

A. Yes, sir.

Q. Where?

A. In New York and Baltimore.

Q. Do you mean that in those places you went under the name of Herrick?

A. Yes.

Q. Did you ever look at this identification closely?

A. Well, I don't recall just looking at it, sitting down and looking at it.

Q. What name was shown on that identification?

A. Howard S. Herrick.

Q. Did that identification show certain physical features of the holder of it?

A. The union card didn't show anything and the license didn't show anything. None of that had anything on it.

Q. Is there anything further, Nealy, which you would care to tell me about these facts or this incident?

A. I think that about covers it all as far as I can remember.

Q. Now again, I want to make certain that you understand that what you have told me has been voluntary on your part, is that right?

A. That is right.

"Q. And no one has made you any promises to get you to tell me that, have they?

A. No.

Q. And you have told me that of your own free will?

A. Yes, sir.

Q. And no one has used any physical force upon you, have they?

A. No.

Q. Now, after these notes have been transcribed and you have had an opportunity to read the transcript, will you be willing to sign the statement?

A. Yes, sir.

A. Yes, sir.

"MR. WARREN: Let the record show that the time is now 6 p.m. exactly.

"(Thereupon the statement was closed.)

"STATE OF MICHIGAN }
COUNTY OF INGHAM } SS.

"I, Paul Skarstad, an official court reporter, do hereby certify that I reported stenographically the conversation between Mr. Jack W. Warren and Mr. Nealy Joseph Buchanon at the Ingham County Jail on October 18, 1956; and that the annexed and foregoing 27 pages is a true, complete and accurate transcription of my shorthand notes so made of said conversation.

"Dated this 18th day of October, 1956.

(signed) Paul Skarstad /s/
Paul Skarstad.

"STATE OF MICHIGAN }
COUNTY OF INGHAM }

"I, Nealy Joseph Buchanon, being first duly sworn, on oath, state: That I have read the above and foregoing statement, consisting of 27 pages, in addition to this one on which my signature appears; that I understand each of the questions therein contained, and that each of the answers as given by me and set down in this transcript of testimony is the truth.

"Dated this 18th day of October, 1956.

(signed) Nealy Joseph Buchanon /s/
Nealy Joseph Buchanon

"STATE OF MICHIGAN }
COUNTY OF INGHAM }

"I, Paul Skarstad, a notary public in and for Ingham County, do hereby certify that there appeared before me a person known to me to be Nealy Joseph Buchanon, that an oath was administered to him that he had read the contents of the annexed transcript, consisting of 28 pages, and that the answers to the questions therein contained were true to the best of his knowledge and belief.

"Dated this 18th day of October, 1956.

(signed) Paul Skarstad /s/
Paul Skarstad, Notary Public in and
for Ingham County, Mich.

My commission expires:

March 24, 1957."

MR. CHAMBERLAIN: If the court please, I would like to request that this Exhibit 6 be incorporated in the file of this proceeding.

THE COURT: Very well.

MR. CHAMBERLAIN: Sheriff Willard P. Barnes.

WILLARD P. BARNES, was thereupon called as a witness in behalf of the People, and being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CHAMBERLAIN:

Q. State your full name and occupation, please?

A. Willard P. Barnes, Sheriff of Ingham County.

Q. And were you Sheriff of Ingham County in September, 1955, please?

A. I was.

Q. Sheriff, you have been present in court this morning since this proceeding started, is that correct?

A. I have.

Q. And you have just heard the testimony in connection with the statement and its being read here?

A. I have.

Q. Were you present at the Ingham County Jail yesterday afternoon when the respondent, Nealy Buchanon, gave that statement?

A. I was.

Q. And in the presence of the other parties listed on the first page there, Mr. Jack Warren, Mr. Nealy Joseph Buchanon, Captain Babcock, and Peter Treleaven?

A. That's correct.

Q. And were you there when the respondent signed that statement?

A. I was.

Q. And you saw him sign his name on it?

A. I did.

Q. Now, you, I believe, have been to Baltimore to apprehend the respondent and return him to Ingham County, is that correct?

A. I have.

Q. During the course of your travels with him have you had some conversations with him?

A. I have.

Q. Did you have any conversation with him in regard to the chopping block that has been mentioned in this statement and has been pictured in these exhibits?

A. I did.

Q. What was the conversation in reference to the chopping block?

A. I asked Mr. Buchanon about the block and if he put it up on the beam. He stated that he did. And I asked him why he put it up there, and he said, "To shove off to knock Mr. Herrick out."

Q. Excuse me. Go ahead if you care to.

A. He explained further to me that on this particular morning that he laid up on top of the beam and laid there waiting for Mr. Herrick to walk around to give him the opportunity to shove the block off on Mr. Herrick's head or on his body some place or other.

Q. Now, have you personally examined this block, Sheriff?

A. Yes, I have.

Q. Could you tell the court of its size and weight?

A. I would say that the block was approximately 2-1/2 feet tall, smaller at the top than at the base, probably 2 foot across at the top, and probably 2-1/2 foot across at the bottom, and consisting of some kind of hard wood.

Q. Did you attempt to lift it?

A. Yes, I did.

Q. At any time?

A. Yes, I did.

Q. About how much would it weigh, would you estimate?

A. Oh, I would guess around 50 pounds.

Q. Now, did you have any discussion with the respondent in regard to the two exhibits that are before you there, the hammer and the grinder?

A. Yes, I did.

Q. What was your conversation with him in regard to those exhibits?

A. I was interested in finding out what he had hit the victims with, and he told me of this grinder which he called a blower at the time but he identified it later. He told me that when Mr. Herrick drove in he was over the tool bench looking the tools over and had this grinder in his hand. Mr. Herrick said to him, "What are you doing there?" and he said, "I was looking at the tools." He walked around back of the car, and Mr. Herrick was getting out of the car, and Mr. Buchanon said that Mr. Herrick turned and he said, "I was just admiring this tool. Would you like to sell it?" and that he waited until Mr. Herrick looked away, "when I had a chance to hit him, and I hit him in the back of the head with the grinder."

Q. Now, what conversations, if any, did you have in reference to the hammer, please, Sheriff?

A. We talked to him about the hammer, and this was one of the tools that he picked from the bench and used it in hitting Mrs. Herrick. That's a ball peen hammer, weighs about 2 pounds. I think in the trade they call it a 2-pound ball peen hammer.

Q. Now, notwithstanding the fact that you heard testimony to the effect that it weighed about three-quarters of a pound?

A. That's right.

Q. Now, did you have any conversation with the respondent in reference to his waiting in this barn all day long?

A. Yes. He told me about waiting there all day long. He told me that he waited and he wanted to knock Mr. Herrick out to get his money and he wanted to get out of Michigan.

Q. Did he make any statements to you in your conversations about taking the wallet from Mr. Herrick?

A. Yes, he did. He told me that after he hit Herrick, Herrick went down. He was attempting to roll him over to get into his hip pocket to get his pocketbook when he heard a noise, and Mrs. Herrick walked around the back of the car. He told me that she said, "What's going on here?" and, of course, he got up, and when he turned around to look at her she screamed, and he said he walked to her and hit her in the head with this grinder.

MR. CHAMBERLAIN: Does the court have any questions?

THE COURT: I have no questions. That is all.

(Thereupon the witness was excused.)

MR. CHAMBERLAIN: May it please the court, we have no further witnesses to present at this hearing at the present time.

If the court please, we have nothing further to offer in behalf of the People.

THE COURT: It is the judgment of this court that the murder of Myra Herrick was murder in the first degree, and it is also the judgment of this court that the murder of Howard Herrick was murder in the first degree.

Will you step up here, Mr. Buchanon? The court will sentence you.

(Respondent standing before bench.)

STATE OF MICHIGAN }
COUNTY OF INGHAM } SS

I, Walter A. Roney, Official Court Reporter, for the Thirtieth Judicial Circuit, do hereby certify that I reported the testimony taken and proceedings had upon the Hearing to Determine Degree of Guilt in the cases of the People v. Nealy Joseph Buchanon, Nos. 12,396 and 12 7, before the Hon. Marvin J. Salmon, Circuit Judge, at Lansing, Michigan, on Friday, October 16, 1956; and that the annexed and foregoing typewritten transcript, consisting of 49 pages, is a true, complete, and accurate transcript of said hearing so held at said time and place.

Walter A. Roney /s/
Walter A. Roney,
Official Court Reporter

Dated: Lansing, Michigan,
May 29, 1957.

Lansing, Michigan,
Friday, October 19, 1956,
12:30 p.m.

— — —

THE COURT: In the case of the People v. Nealy Joseph Buchanon, for the murder of one, Howard Herrick, the court is about to sentence you, Mr. Buchanon. Is there anything you have to say why sentence should not be pronounced against you?

THE RESPONDENT: No, sir.

THE COURT: It is the sentence of the court that you be confined in the State's Prison of Southern Michigan at Jackson, Michigan, for life.

In the case of the People v. Nealy Joseph Buchanon, for the murder of Myra Herrick, the court is about to sentence you, Mr. Buchanon. Is there anything you have to say why sentence should not be pronounced against you?

THE RESPONDENT: No, sir.

THE COURT: It is the sentence of the court that you be confined in the State's Prison of Southern Michigan at Jackson, Michigan for life.

And let me say this for the record. This was a very cold, calculated, premeditated killing, with malice aforethought. Having in mind the manner in which you committed the crime and the purpose for which you committed the crime, the court is satisfied that you would commit murder again if you thought it would serve you in any way.

Therefore, and for the record, it is my opinion that this sentence should never be softened or decreased, and that you should remain in prison the rest of your life.

That is all.

— — —

I, Marvin J. Salmon, Circuit Judge for the Thirtieth Judicial Circuit, do hereby certify that the above stenographic record is a true record of the proceedings had.

_____

Circuit Judge.

STATE OF MICHIGAN }
COUNTY OF INGHAM } SS

I, Walter A. Roney, Official Court Reporter for the Thirtieth Judicial Circuit, do hereby certify that I reported the proceedings had upon the Sentence in the cases of the People v. Nealy Joseph Buchanon, Nos. 12,396 and 12,397, before the Hon. Marvin J. Salmon, Circuit Judge, at Lansing, Michigan, on Friday, October 16, 1956; and that the annexed and foregoing typewritten transcript is a true, complete, and accurate transcript of said proceedings.

Walter A. Roney /s/

Walter A. Roney,
Official Court Reporter.

Dated: Lansing, Michigan,
May 29, 1957.

ORIGINAL

NO. 84-501 (3)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

BARRY MINTZES,

Petitioner,

-vs-

NEALY BUCHANON,

Respondent.

On Writ of Certiorari To The United States
Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK D. EAMAN
EAMAN & RAVITZ, P.C.
Attorney for Respondent
1724 Ford Building
Detroit, MI 48226
(313) 963-1610
(Admission to the Bar of
this Court Pending)

20 pp

RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

WHERE THE RESPONDENT PRESENTED TO FEDERAL COURT A HABEAS CORPUS PETITION ASKING VACATION OF HIS 23 YEAR OLD CONVICTION OF MURDER IN THE FIRST DEGREE BECAUSE HE WAS NOT AFFORDED THE ASSISTANCE OF COUNSEL AT THE TIME OF HIS CONVICTION, WHERE FULL TRANSCRIPTS OF ALL STATE COURT PROCEEDINGS EXIST, WHERE THE TRIAL JUDGE AND THE REPSONDENT RETAINED MEMORY OF THE COURT PROCEEDINGS, AND WHERE THE STATE DOES NOT DISPUTE THAT RESPONDENT WAS DENIED THE ASSISTANCE OF COUNSEL, DOES RULE 9(a) OF 28 USC FOLL. §2254 BAR RELIEF TO THE RESPONDENT?

II.

WAS A HEARING HELD BY THE STATE COURT TO DETERMINE WHETHER THE RESPONDENT WOULD BE FOUND GUILTY OF MURDER IN THE FIRST DEGREE OR MURDER IN THE SECOND DEGREE AND TO DETERMINE THE RESPONDENT'S PUNISHMENT A SEPARATE, CRITICAL STAGE OF THE STATE COURT PROCEEDINGS WHICH REQUIRED THE COURT TO AFFORD THE ASSISTANCE OF COUNSEL TO RESPONDENT OR SECURE A WAIVER OF COUNSEL FROM RESPONDENT.

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TABLE OF AUTHORITIES

ADDITIONAL STATUTES INVOLVED

MCLA 750.316, MSA 28.548

Sec. 316. FIRST DEGREE MURDER -- All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life.

MCLA 750.317, MSA 28.549

Sec. 317. SECOND DEGREE MURDER -- All other kinds of murder shall be murder of the second degree, and shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same.

STATEMENT OF THE CASE

In addition to facts stated by the Petitioner in his Petition for Writ of Certiorari, the Respondent would add the following facts to the Court's record.

For purposes of review of these proceedings, a full transcript exists of all state court proceedings, including the Respondent's arraignment and waiver of preliminary examination in state district court, Respondent's arraignment and plea of guilty in state circuit court, and Respondent's hearing in state circuit

court to determine his degree of guilt on the open charge of murder (Petitioner's Appendix 51a, 55a; Respondent's Appendix 1a.) As the transcripts of all proceedings reveal, at no time was the Respondent afforded the assistance of counsel. As the transcripts further reveal, the time between Respondent's counselless confession to law enforcement authorities (5:24 P.M., October 18, 1956) and Respondent's counselless sentence to life in prison without parole (12:30 A.M., October 19, 1956) was a period of less than 24 hours. (Petitioner's Appendix 69a, 104a)

The Respondent's plea of guilty without counsel to an open charge of murder was a brief proceeding which commenced at 9:30 A.M., October 19, 1956. During those proceedings the state judge had the following colloquy with the prosecutor regarding the setting of a time to take testimony to determine the Respondent's degree of guilt.

> THE COURT: Let the record show that the court has conferred with the accused relative to the circumstances in each one of these crimes, is convinced that he committed the crimes, and that his plea was freely, understandingly and voluntarily made, without undue influence, compulsion or duress and without promise of leniency. Therefore his pleas are accepted and he is remanded to the custody of the county sheriff to await the taking of testimony of witnesses to determine the degree of the crime, and for sentence.
>
> MR. CHAMBERLAIN: Shall we set that time now, your honor?
>
> THE COURT: Yes.
>
> MR. CHAMBERLAIN: May it please the court, I should like to state that we are hoping to be able to proceed as far as the prosecution is concerned by 11 o'clock this morning.
>
> THE COURT: Very well; let me check with the assignment clerk.
>
> (Petitioner's Appendix 53a)

[1] The purpose of the "degree hearing" was to determine whether Respondent would be found guilty of murder in the first degree or murder in the second degree; the penalty for murder in the first degree in the State of Michigan was mandatory life without

parole; the penalty for murder in the second degree was any term of years up to life. MCLA 750.316; MSA 28.548. MCLA 750.317; MSA 28.549. The record is clear that Respondent was not afforded the assistance of counsel, did not waive counsel, and did not question witnesses or participate in any way his degree hearing. (Petitioner's Appendixes 55a-104a)

The Federal District Court held an Evidentiary Hearing in this matter at which the state trial judge testified as to his recollection of the court proceedings and the Respondent testified as to his recollection of the court proceedings (Petitioner's Appendix 42a-43a). At the Evidentiary Hearing in the District Court, Respondent, a black man charged with the murder of two white people in a rural Michigan county, testified that the atmosphere surrounding his arrest and detention in the rural community of Stockbridge included a mob outside the jail peering through the windows of the jail at him; newspaper clippings of the day were introduced at the Evidentiary Hearing showing that additional deputies had to be called for crowd control; the state trial judge stated he was unaware of this mob atmosphere. (Petitioner's Appendix 37a, 42a, 43a, 41a)

REASONS FOR NOT GRANTING THE WRIT

I.

THIS CASE, WHERE IT IS UNDISPUTED THAT THE RESPONDENT HAS BEEN IMPRISONED AS A RESULT OF COUNSELLESS PROCEEDINGS, WHERE FULL TRANSCRIPTS EXIST OF ALL STATE COURT PROCEEDINGS, AND WHERE THE TRIAL JUDGE AND THE RESPONDENT RETAINED MEMORY OF THE PROCEEDINGS AND TESTIFIED IN FEDERAL DISTRICT COURT, IS AN INAPPROPRIATE CASE TO REVIEW THE APPLICATION OF LACHES OR RULES EMBODIED IN 28 USC FOLL. §2254.

---

[1] Judge Wellford, in his Opinion in the United States Court of Appeals for the Sixth Circuit in this case, noted that at the Respondent's degree hearing, there was nothing in the transcript that indicated any mention of right to counsel or any knowing

waiver of.right to counsel for the purposes of the degree hearing or sentencing. (Petitioner's Appendix 17a). Accordingly, he wrote that there was a sufficient record of the proceedings to indicate that the state had not been prejudiced in its ability to respond to the Respondent's claims which attacked his conviction of murder in the first degree based on a counselless degree hearing. Judge Contie of the United States Court of Appeals for the Sixth Circuit, in his Opinion in this case, agreed with Judge Wellford that 18 U.S.C. §2254, Foll. Rule 9(a) did not bar consideration of the claim that the Respondent did not waive his right to counsel at the degree and sentencing hearing; Judge Contie also believed that the state had not demonstrated prejudice in several other claims and did not find them barred by Rule 9(a). (Petitioner's Appendix 17a-18a)

There is no dispute that Respondent was not afforded the right to counsel at any stage of his proceedings; there is no dispute that Respondent was not asked whether or not he waived counsel for purposes of his degree hearing which determined whether he would be guilty of murder in the first degree or murder in the second degree. At no time has the state claimed any actual prejudice in responding to claims of a counselless conviction in this case. The state wishes this court to focus merely on the length of delay and the fact that some witnesses are now deceased or cannot remember the events of these proceedings. However, given the existence of a full transcript and the availability of the trial judge as a witness, the decision of the Court of Appeals for the Sixth Circuit that the state was not prejudiced in its response to Respondent's claims that his conviction was invalid because of the absence of counsel and the absence of waiver of counsel was clearly correct and this case presents no significant question which should be reviewed by this Court.

Indeed, the Sixth Circuit has applied Rule 9(a) to cases involving a long delay where the transcript of the proceedings

has been lost and cannot be located. Arnold v Marshall, 657 F2d 83 (6th Cir., 1961).

Conversely, the existence of a transcript and a trial record has not barred a decision on the merits of a petitioner's claim even after a long delay. Henagan v Anderson, 500 F Supp 671 (D.C.Mich., 1980) (13 year delay did not bar determination of ineffective assistance of counsel claim from the trial record); Neal v Wainwright, 512 F Supp 92 (D.C. Fla, 1981) (12 year delay did not bar habeas corpus relief where transcript preserved discussion between petitioner and his counsel which formed the basis of petitioner's claim.)

In this case the state was not only unable to demonstrate prejudice in responding to the claims of the Respondent, the state was able to meet this claim on the merits and to successfully prove to the District Court and to the United States Court of Appeals for the Sixth Circuit that some of the Respondent's claims were without merit. (Petitioner's Appendix 1a-23a, 24a-32a)

II.

RESPONDENT'S COUNSELLESS CONVICTION OF MURDER IN THE FIRST DEGREE WAS NOT A UNITARY PROCEEDING; THE DEGREE HEARING WHICH FOLLOWED THE RESPONDENT'S PLEA TO AN OPEN CHARGE OF MURDER WAS A CRITICAL STAGE OF THE PROCEEDINGS AT WHICH WITNESSES TESTIFIED AND THE OUTCOME OF WHICH DETERMINED THE DIFFERENCE IN RESPONDENT'S SENTENCE; RESPONDENT SHOULD HAVE BEEN AFFORDED COUNSEL AT THAT STAGE OF THE PROCEEDINGS OR EXPLICITLY WAIVED COUNSEL.

Judge Wellford of the United States Court of Appeals for the Sixth Circuit, in his Opinion allowing habeas corpus relief to the Respondent, stated:

> There is, first of all, no question but that this hearing on the determination of the degree of guilt was a critical stage and bore directly on the punishment and/or disposition which was to be made by the state court after acceptance of

> the guilty plea. The right to counsel was a matter of 'supreme importance' at this stage of the proceeding. (Petitioner's Appendix 15a-16a)

Judge Contie of the United States Court of Appeals for the Sixth Circuit agreed with Judge Wellford (Petitioner's Appendix 17a).

Indeed, the United States Supreme Court has recognized the significance of a "degree hearing" in Michigan. In Moore v Michigan, 355 U.S. 155, 160 (1957), Mr. Justice Brennan, in discussing degree hearings in Michigan, stated:

> . . .[T]he proceedings to determine the degree of murder, the outcome of which determined the extent of punishment, introduced their own complexities. With the aid of counsel, the petitioner, who as we have said neither testified himself in the proceedings nor cross-examined the prosecution's witnesses, might have done much to establish a lesser degree of the substantive crime, or to establish facts and make argument which would have mitigated the sentence. The right to counsel is not a right confined to representation during the trial on the merits.

Judge Wellford and Contie of the United States Court of Appeals for the Sixth Circuit relied upon Moore in their ruling that the degree hearing was a significant stage, and Judge Wellford noted that Moore held that the right to counsel was a matter of "supreme importance" at the degree hearing. 355 U.S. at 164.

It is clear that at no time was Respondent afforded the right to counsel at this hearing or was he asked whether he waived counsel for purpose of this hearing. It is further clear that these were not unitary proceedings but bifurcated proceedings involving a plea and a subsequent court hearing. As the trial judge said at the time of the plea:

> THE COURT: Let the record show that the court has conferred with the accused relative to the circumstances in each one of these crimes, is convinced that he committed the crimes, and that his plea was freely, understandingly and voluntarily made, without undue influence, compulsion or duress and without promise of leniency. Therefore

> his pleas are accepted and he is remanded to the custody of the county sheriff to await the taking of testimony of witnesses to determine the degree of the crime, and for sentence.
>
> MR. CHAMBERLAIN: Shall we set that time now, your honor?
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> THE COURT: Yes.
>
> MR. CHAMBERLAIN: May it please the court, I should like to state that we are hoping to be able to proceed as far as the prosecution is concerned by 11 o'clock this morning.
>
> THE COURT: Very well; let me check with the assignment clerk.

The degree hearing involved the testimony of four witnesses presented by the prosecutor and the introduction of six exhibits (Petitioner's Appendix 56a). At no time was Respondent afforded any opportunity to participate in the degree hearing, with or without counsel (Petitioner's Appendix 55a-106a). At the conclusion of the degree hearing, Respondent was sentenced, without counsel, to life in prison (Petitioner's Appendix 106a).

A plea to an open charge of murder in a subsequent judicial proceeding known as a "degree hearing" has been established by Michigan Criminal Procedure. A Michigan statute (MCLA 750.318; MSA 28.550) provides for the determination of the degree of murder where a person is convicted "by confession" to the court:

> The jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain their verdict, whether it be murder of the first or second degree; but, if such person shall be convicted by confession, the court shall proceed by examination of witnesses to determine the degree of the crime, and shall render judgment accordingly. All testimony taken at such examination shall be taken in open court and a typewritten transcript or copy thereof, certified by the court reporter taking the same, shall be placed in the file of the case in the office of the county clerk.

The Michigan Supreme Court, in interpretation of the statute which provides for a degree hearing, has made certain findings. First of all, the examination of witnesses is mandatory, and the failure to conduct the examination in open court deprives a court of jurisdiction to accept the plea. People v Martin, 316 Mich.

669, 672, 673, 32 N.W. 2d 669 (1947); People v Machus, 321 Mich. 353, 32 N.W. 2d 480 (1948). Also, a witness in a degree hearing is one who, under oath gives his own knowledge of facts at issue in an open courtroom. People v Martin, supra. Failure to conduct a degree hearing is not a simple error of procedure but involves a deprivation of "an essential right, the observance of which is made mandatory by statute." People v Martin, supra.

Under Michigan law and procedure, the degree of murder of which a defendant is found guilty is critical to his sentence. MCLA 750.316; MSA 28.548 provides that the punishment for a conviction of murder in the first degree shall be "solitary confinement or hard labor in the state prison for life." The crime of second degree murder (MCLA 750.317; MSA 28.549) is "imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same." The distinction in life sentences under the statute has been that for first degree murder, a person serves natural life without eligibility for parole, but under a life sentence for second degree murder a person can be eligible for parole after serving ten (10) years of his sentence. Richardson v Hatch, 134 F.Supp. 110 (D.C. Mich. 1955). The sentence of mandatory life for first degree murder has been held not to constitute cruel and unusual punishment in Michigan. People v Smith, 108 Mich. App. 338, 310 N.W. 2d 235 (1981).

Indeed, since the degree hearing involves a sentencing determination of the criminal defendant, it is obviously a critical stage of the proceedings which requires counsel. Mempa v Rhay, 389 U.S. 128 (1967). The United States Court of Appeals for the Seventh Circuit has also recognized that where Defendant validly waived counsel at the time of his plea, a subsequent sentencing proceeding was infirm where there was no counsel present at sentencing and no separate waiver of counsel at sentencing proceeding. Schell v United States, 423 F.2d 101 (7th Cir., 1970).

RELIEF

WHEREFORE, the Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

FRANK D. EAMAN
Attorney for Respondent
1724 Ford Building
Detroit, MI 48226
(313) 963-1610
(Admission to the Bar of this Court Pending)

Dated: October 24, 1984

APPENDIX

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EDITOR'S NOTE

PAGES 1a-1d WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

STATE OF MICHIGAN

IN THE JUSTICE COURT FOR THE CITY OF MASON

THE PEOPLE OF THE STATE OF MICHIGAN	)
VS.	)
NEALY BUCHANON,	)
Respondent.	)

Proceedings had upon the Arraignment in the above-entitled cause before the Hon. Roy W. Adams, Justice of the Peace for the City of Mason, at Mason, Michigan on Thursday, October 18, 1956, at 8 p. m.

PRESENT:

CHARLES E. CHAMBERLAIN, Esq., ProsecutingAttorney in and for the County of Ingham,

Representing the People.

THE COURT: Have you explained Mr. Buchanon's rights to him in this hearing?

MR. CHAMBERLAIN: No, not in this one, your honor.

THE COURT: You are Nealy Buchanon?

THE RESPONDENT: Yes, sir.

THE COURT: I have a complaint by Willard P. Barnes that on the 3rd day of September, 1955 at the Township of Stockbridge, County of Ingham, Nealy Buchanon did then and there murder one Myra Herrick in violation of Section 316 of Act 328, Public Acts of 1931, Compiled Laws of 1948, Section 750.316, Michigan Statutes Annotated Section 28.548. In other words, you are charged with murdering the lady out there on the 3rd of September, 1955.

Now at this time you can ask for an examination in my court or you can take your choice to take this directly into circuit court. Do you understand that?

THE RESPONDENT: Yes, sir.

THE COURT: You have been through this procedure at previous occasions, have you, so you understand what it is?

THE RESPONDENT: Yes, sir.

THE COURT: Now which do you wish to do? Do you wish to have an examination or do you wish to waive that examination?

THE RESPONDENT: I wish to waive examination.

THE COURT: And take it directly into circuit court?

THE RESPONDENT: Yes, sir.

THE COURT: I also have the complaint of Willard P. Barnes that on the 3rd day of September, 1955 at the Township of Stockbridge, Ingham County, one Nealy Buchanon did then and there murder one Howard Herrick in violation of Section 316 of Act 328, Public Acts of 1931, compiled laws of 1948, Section 750.316, Michigan Statutes Annotated Section 28.548. That is the charge for the murder of Howard Herrick?

THE RESPONDENT: Yes, sir.

THE COURT: That was the man. Out in Stockbridge Township, the 3rd day of September, 1955. The same charge. Now what do you wish to do in respect to that charge?

THE RESPONDENT: Waive the examination.

THE COURT: Do you wish to waive examination?

THE RESPONDENT: Yes, sir.

THE COURT: Well, it is the order of this court that on each of these charges you shall be held without bail to appear in the Circuit Court for the County of Ingham on the 19th day of October, 1956, at 1:30 p. m. at the court room in the City of Lansing.

MR. CHAMBERLAIN: May it please your honor, we would like to have that at 9:30 a. m. In the morning.

THE COURT: At 9:30 a. m. In the morning?

MR. CHAMBERLAIN: Yes, sir.

THE COURT: Strike that 1:30 and make it 9:30 a. m. on

that date. That is tomorrow morning at 9:30 in the City of Lansing in circuit court for arraignment. You are held without bail. Do you understand that?

THE RESPONDENT: Yes, sir.

THE COURT: This session is now adjourned.

STATE OF MICHIGAN)
) SS.
COUNTY OF INGHAM)

I, Paul Skarstad, an official court reporter for the 30th Judicial Circuit, do hereby certify that I reported the proceedings had upon the Arraignment in the case of the People v. Nealy Buchanon, before the Hon. Roy W. Adams, Justice of the Peace for the City of Mason, at Mason, Michigan on October 18th, 1956; and that the annexed and foregoing typewritten transcript is a true, complete and accurate transcript of said proceedings.

Dated this 25th day of October, 1956.

Paul Skarstad,
311 City Hall,
Lansing, Mich.

PAUL SKARSTAD
Official Court Reporter

A-11

ld

NO. 84-501

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

BARRY MINTZES,

Petitioner,

-vs-

NEALY BUCHANON,

Respondent.

On Writ of Certiorari To The United States
Court of Appeals for the Sixth Circuit

CERTIFICATE OF SERVICE

FRANK D. EAMAN, states that on the 25th day of OCTOBER, 1984, he served a true copy of: BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

on:
FRANK J. KELLY, ATTORNEY GENERAL
LOUIS J. CARUSO, Solicitor General
ERIC J. EGGAN, Assistant Attorney General

at: Appellate Division
Law Building, 7th Floor
Lansing, MI 48913

by placing said true copy in a envelope, addressed to the above named, and depositing the same in the United States Mail, with postage thereon fully paid.

FRANK D. EAMAN
Attorney for Respondent

(Admission to the Bar
of this Court pending)

No. 84-501

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

BARRY MINTZES,

Petitioner,

v

NEALY BUCHANON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUGGESTION OF MOOTNESS

FRANK J. KELLEY
Attorney General

Louis J. Caruso
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No. 84-501

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

BARRY MINTZES,

Petitioner,

v

NEALY BUCHANON,

Respondent.

SUGGESTION OF MOOTNESS

NOW COMES Petitioner, by and through his attorneys, Frank J. Kelley, Attorney General for the State of Michigan, Louis J. Caruso, Solicitor General, and Eric J. Eggan, Assistant Attorney General, and pursuant to the rules of this Honorable Court hereby states the following circumstances evidencing mootness:

1. On September 27, 1984, Petitioner filed an application for writ of certiorari in this Honorable Court.

2. On October 24, 1984, a writ of certiorari issued.

3. On December 7, 1984, Respondent Nealy Buchanon died in the Ingham County, Michigan, Medical Center, of complications arising from a cancerous tumor.

4. Petitioner is compelled to suggest that the instant cause has been rendered moot by Mr. Buchanon's death. In a conversation between counsel on December 10, 1984, counsel for Respondent, Mr. Frank Eaman, indicated his concurrence in the instant suggestion of mootness. Counsel for Respondent does not concur in the relief requested by Petitioner.

5. The parties concur in a request that the briefing schedule heretofore established be held in abeyance pending disposition of the Court on the issue of mootness. In a conversation with the Clerk of the Court, Alexander Stevas, December 7, 1984, counsel was informed that the schedule would be held in abeyance.

6. If this Court concludes that this case is moot, Petitioner suggests the appropriate resolution of the case would be to vacate the judgments of the Court of Appeals and District Court and remand with directions to dismiss the complaint for habeas corpus as moot. *Knapp* v *Baker*, 509 F2d 922 (CA 5, 1976). *See, United States* v *Munsingwear*, 340 US 36 (1950). Unlike *Warden, Green Haven State Prison* v *Palermo*, 431 US 911 (1977), this Court has already recognized the significance of the issues in this case by granting certiorari and under these circumstances it would be unjust to permit the erroneous judgments of the Court of Appeals and District Court to remain in effect.

RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Petitioner suggests that this case is moot because of the Respondent's death, and if the Court concludes that the case is moot, Petitioner

respectfully requests this Court to vacate the judgments of the Court of Appeals and District Court and remand the case with directions to dismiss as moot.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Louis J. Caruso /s/
Louis J. Caruso
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Dated: December 11, 1984

SUPREME COURT OF THE UNITED STATES

BARRY MINTZES, WARDEN *v.*
NEALY BUCHANON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84–501. Decided April 15, 1985

PER CURIAM.

The Court is advised that the respondent died in Ingham County, Mich., on December 7, 1984. The Court's order granting the writ of certiorari, see —— U. S. —— (1984), therefore is vacated, and the petition for certiorari is dismissed. See *Warden* v. *Palermo*, 431 U. S. 911 (1977).

It is so ordered.

JUSTICE POWELL took no part in the decision of this case.

(6)

SUPREME COURT OF THE UNITED STATES

BARRY MINTZES, WARDEN *v.* NEALY BUCHANON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84–501. Decided April 15, 1985

CHIEF JUSTICE BURGER, dissenting.

In this case, the District Court and the Court of Appeals for the Sixth Circuit ordered that respondent either be released or given a new hearing on the degree of his crimes and a resentencing. This was ordered despite the passage of 25 years since respondent's convictions for two murders committed while he was a fugitive on escape from prison. Both courts held that laches did not bar respondent's claim that he did not knowingly and intelligently waive his right to counsel at the hearing and sentencing in 1956. Understandably troubled by the possible ramifications of such a drastic holding and concerned that even in this particular case it would be prejudiced in its defense to the allegations, given the loss of records, faded memories, and intervening deaths, the State of Michigan sought certiorari to review the judgment of the Court of Appeals. We granted the State's petition and set the case for argument. —— U. S. —— (1984).

Now, having been informed that the respondent has died, the Court simply directs that our order granting certiorari be vacated and the petition for certiorari dismissed, thereby leaving the Court of Appeals opinion standing. In reaching this surprising result, the Court relies upon a single authority which, it is clear upon analysis, does not support, let alone require such a disposition, see *Warden* v. *Palermo*, 431 U. S. 911 (1977). And it ignores the one precedent which *does* directly control on this question. See *McMann* v. *Ross*, 396 U. S. 118 (1969) *(per curiam); McMann* v. *Richardson*, 397 U. S. 759, n. 1 (1970).

5PP

In *McMann* v. *Ross*, the only case to have presented the precise issue we have here, the Court vacated the judgment and opinion of the Court of Appeals and remanded to the District Court with instructions to dismiss the respondent's petition for writ of habeas corpus as moot. I would, as petitioner urges, dispose of this case in the same way. This is the course we have chosen to pursue in every civil case that becomes moot either pending a decision on certiorari or after we have granted a writ of certiorari, except *Warden* v. *Palermo*, which even if it were correct is plainly distinguishable. Thirty-five years ago, the Court noted that,

> "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here *or pending our decision on the merits* is to reverse or vacate the judgment below and remand with instructions to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950) (footnote omitted) (emphasis added).

Indeed, as the Court said in *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, 267 (1936), this is the "duty" of this Court. Such a disposition "clears the path for future relitigation of the issues between the parties." *Munsingwear*, *supra*, at 40. In this case it is possible, for example, that by applying collateral estoppel offensively, relatives of the defendant might well invoke the Sixth Circuit's decision in a subsequent civil suit for damages. Moreover, by vacating the Court of Appeals' judgment and opinion and remanding with instructions to dismiss as moot, we "eliminate[ ] a judgment, review of which was prevented through happenstance." *Ibid.* And it is *only* through this procedure that "the rights of all parties are protected." *Ibid.*

The Court mistakenly believes that our four-line order in *Palermo*, *supra*, *requires* that we only vacate the order granting certiorari and dismiss the petition. I do not understand how *Palermo* can possibly be regarded as controlling the disposition here. *Palermo* is significantly differ-

ent from this case in at least one obvious respect—there, we had *not* granted the petition for certiorari. So also was the case in *Dove* v. *United States*, 423 U. S. 325 (1976), the authority we relied upon for our dismissal of the petition in *Palermo*. While in some circumstances we may wish to treat cases in which we have granted certiorari similarly to those in which a petition for certiorari has merely been filed here, it is inconceivable to me that we would ever consider ourselves *bound* to treat these two patently different categories of cases identically.

In my view, the Court has a higher duty when it learns that a case has become moot after it has granted review than when it discovers that a case in which review is being sought has become moot. In the former instance, the Court has, by its grant of the writ, asserted jurisdiction over the case, and brought the judgment of the lower court before it. If the Court simply vacates its order granting certiorari, it forces upon the parties and the courts below the problems it avoids for the sake of its own convenience. The Court's action today leaves unclear, for instance, whether the Court of Appeals opinion remains as precedent as between the parties or their successors in any future proceeding. It is likewise unclear whether the opinion is generally to have precedential value in the Sixth Circuit. Finally, there remains considerable uncertainty over whether the Court of Appeals is required or permitted to vacate its opinion. Indeed, I suppose there will be a question whether the Court of Appeals even has jurisdiction to vacate or otherwise modify its opinion, given that our writ of certiorari is still lodged in that court; at the very least, the Court should vacate its writ of certiorari. Cf. *Westinghouse Electric Corp.* v. *Vaughn*, —— U. S. —— (1984); *Colorado* v. *Nunez*, —— U. S. —— (1984); *Gillette Co.* v. *Miner*, 459 U. S. 86 (1982). The Court's disposition leaves the status of the Court of Appeals' judgment and opinion in limbo. I believe we have an institutional obligation to avoid such confusion. This is easily

achieved by following what heretofore, with the exception of *Warden* v. *Palermo*, has been our "established practice."

Even if one accepts the dubious proposition that the Court is duty-bound to treat *granted* cases identical to cases where the petition for a writ of certiorari is pending, I still believe the Court's disposition is incorrect because I am convinced the Court disposed of *Palermo* improperly. *Palermo*, it is true, was a case before us on habeas and we did dismiss the certiorari petition. The Court relied entirely, however, on *Dove*, a case which was before us on direct review, not habeas. In a case on *direct* review, it may be necessary simply to dismiss the petition to avoid the result in *Durham* v. *United States*, 401 U. S. 481 (1971), of having a defendant's indictment dismissed, which in turn has the effect of "wip[ing] the slate entirely clean of a federal conviction which was unsuccessfully appealed throughout the entire appeal process to which the petitioner was entitled as of right," *id.*, at 484 (BLACKMUN, J., dissenting). The only alternative—and surely an unsatisfying one—would be for the Court to decide case-by-case whether it believes the decision in question to be correct or incorrect, and dismiss the petition for certiorari or vacate the judgment accordingly.

But plainly there is no such dilemma presented when a case is before us on writ of certiorari to review a judgment obtained on habeas. In such a case, our objectives of eliminating as precedent an opinion and judgment of which no final review is possible and clearing the path for any future litigation are achievable—and incidentally, without at the same time embracing a principle that would require dismissal of indictments—by vacating the opinion below and remanding with instructions to dismiss the habeas petition.

Even the Court in *Durham* recognized the validity of distinguishing in this context between cases on direct and habeas review; the Court very carefully limited its holding to cases on direct review, see 401 U. S., at 482–483. Our order in *Dove* also contemplated this distinction. In *Dove*, we

overruled *Durham only* "[t]o the extent that [*Durham*] may be inconsistent with" our disposition in *Dove*. We thereby removed any doubt that *McMann*—which otherwise one might have thought the Court also intended to overrule—was still valid precedent. Under the circumstances, especially since *Palermo* not only relied upon inapposite authority but failed even to acknowledge *McMann*, I would not, as the Court does, read *Palermo* as limiting us to a dismissal.

If it were true, however, as the Court implicitly must believe, that we are required now to overrule either *McMann* or *Palermo*, I would "overrule" the latter. *Palermo* is the case inconsistent with our asserted "established practice." *Palermo*, not *McMann*, is the disposition in search of a rationale.

Because I believe we should not compound the evils of a bad practice by repeating the error here, I dissent.